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In the Supreme Court of the United States

ANN VENEMAN, SECRETARY, UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

NEBRASKA CATTLEMEN, ET AL., PETITIONERS

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX
VOL. 2

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PETITION FOR WRIT OF CERTIORARI FILED: FEB. 13, 2004
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

Civil Action No. 00-1032

LIVESTOCK MARKETING ASSOCIATION, ET AL.,
PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
ET AL., DEFENDANTS

&

NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

THIRD SUPPLEMENTAL DECLARATION OF BARRY CARPENTER

I, Barry Carpenter, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration in response to the Court's request for documentation regarding the Department of Agriculture's ("Department") exercise of its role in certifying the ten members of the Beef Promotion Operating Committee ("Operating Committee") elected from the boards of directors of the Qualified State Beef Councils. Such authority is exercised pursuant to the requirements of the Beef Promotion and Research Act ("Act"), 7 U.S.C. § 2904(4)(A),

and the Beef Promotion and Research Order ("Order"), 7 C.F.R. § 1260.161(c).

2. This declaration is based on my personal knowledge and information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

3. As set forth in my prior declarations in this case and my testimony at trial, and pursuant to the requirements of the Act and the Order, once the Federation of Qualified State Beef Councils ("Federation") elects its representatives to the Operating Committee, the Department verifies both that: (a) the electees have been duly elected by the Federation as its representatives to the Operating Committee, and (b) each electee is a producer and a member or ex-officio member of the board of directors of a Qualified State Beef Council, as that term is defined in the Act and Order.

4. In addition, the Department conducts internal background checks on each electee to ascertain whether the electees are in good standing with the Department and to determine whether the Department is aware of any information which might impact negatively on the certification of these individuals' election to the Operating Committee. In carrying out this check, the Department's Agricultural Marketing Service refers the electees' names to the following Department agencies: the Farm Services Agency; the Grain Inspection, Packers and Stockyards Administration; the Food Safety Inspection Service; the Rural Business-Cooperative Service; and the Rural Housing Service.

5. Finally, pursuant to the Order, each electee is required to submit a signed Conflict of Interest Statement in which the electee agrees to disclose any re-

lationships that he or she has with any beef promotion entity or any organization that has, or is being considered for a contractual relationship with the Cattlemen's Beef Promotion and Research Board or the Operating Committee.

6. Records reflecting the Federation's confirmation of election, the Department's internal background check, and the Department's certification of electees, as described in paragraphs 3 and 4 above, in each of the years 1997-2001, respectively, are attached hereto as Defendants' Exhibits 247 to 251. (Exhibit 247 covers 1997, exhibit 248 covers 1998, etc).[1]

7. Attached hereto as Exhibit 252 is an example of the conflict of interest statement, described in paragraph 5 above, and signed by each Operating Committee electee from 1997-2001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of January 2002.

/s/ BARRY L. CARPENTER
BARRY CARPENTER

[1] In the interests of the electees' privacy, their Social Security numbers have been redacted from all documents attached hereto.

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DECLARATION OF THOMAS RAMEY

I, Thomas Ramey, hereby make the following declaration with respect to the above captioned matter:

1. I am providing this declaration in response to the Court's request for documentation regarding the Cattlemen's Beef Promotion and Research Board's ("Beef Board" or Board") budget and investments. This declaration is based on my personal knowledge and on information obtained in the course of my employment. If called as a witness, I could competently testify to the facts set forth herein.

2. I am the Chief Financial Officer of the Beef Board. In that capacity, I am primarily responsible for

all of the Beef Board's financial and accounting activities, including oversight of the Board's annual budgets and investments pursuant to the Beef Promotion and Research Act ("Act" or "Beef Act") and the Beef Promotion and Research Order ("Order" or "Beef Order").

3. In Fiscal Year 2001, actual checkoff revenues collected pursuant to the Beef Act and Order totaled $86,099,403. *See* Cattlemen's Beef Board, Actual Beef Checkoff Revenues, Fiscal Year 2001, attached hereto as Defendants' Exhibit 255.

4. Of this total, the Beef Board's portion of the assessments totaled $47,469,581, which consists of its portion of the assessments collected in states with QSBCs ($38,629,822), assessments collected in states without QSBCs ($60,907), and assessments collected from importers ($8,778,852). *See* Exh. 255. The Beef Board's total assessment revenue, together with interest income ($1,820,563) and other revenues ($24,383), constitute its total revenue of $49,314,527 for FY 2001. *See* Exh. 255. *See also* Statements of Revenues and Expenses and Changes in Fund Balances, September 30, 2001 and 2000, Annual Report 2001, attached hereto as Defendants' Exhibit 256.

5. In FY 2001, the QSBCs' portion of the collected assessments totaled $38,629,822, which is half of the assessment collected in states with QSBCs. *See* Exh. 255.

6. The Act provides that the Beef Board, with the approval of the Secretary of the United States Department of Agriculture ("USDA"), may invest, pending disbursement, funds collected through assessment only in obligations of the United States or any agency thereof, in general obligations of any State or any

political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States. 7 U.S.C § 2904(9).

7. Pursuant to that policy, the Beef Board invests its funds according to USDA's Agricultural Marketing Services' investment policy. *See* AMS Directive, Investment of Public Funds, attached hereto as Defendants' Exhibit 257. Recent investment funds include the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Bank, Federal Farm Credit Banks, and repurchase agreements at Commerce Bank of Kansas City, N.A., that are fully collateralized by U.S. Government securities. A true and accurate copy of the Beef Board's Daily Investment Report as of December 31, 2001, which reflects these investments, is attached hereto as Exhibit 258.

8. As demonstrated by the Daily Investment Report, the weighted average yield for Beef Board investments, as of December 31, 2001, is 3.049%. *See* Exh. 258. The weighted average yield for each of the prior quarters was as follows: 6.151% as of March 31, 2001; 5.139%, as of June 30, 2001, and 4.022%, as of September 30, 2001. A true and accurate copy of a document I prepared documenting weighted average yield of the Beef Board's investments over the past ten months is attached hereto as Exhibit 259.

9. On April 9, 2001, the Beef Board's members of the Budget Committee projected the Board's interest income for FY 2002, using a 4.5% interest rate, at $985,000. *See* Defendants' Exh. 255, submitted at trial. The average yield on Beef Board investments, as of

March 31, 2001, was 6.151%. *See* Exh. 259. As we did not anticipate such a sharp reduction in short-term interest rates in the latter half of 2001, at the time 4.5% appeared a reasonable interest rate with which to make projections. A true and accurate copy of the calculation used to project that number is attached hereto as Exhibit 260.

10. The majority of the Beef Board's investments are composed of funds committed to projects that have been approved by the Beef Board and USDA, but which have not yet been completed. As expenses are incurred in these projects and the Board receives bills from its contractors, the Board uses invested funds to reimburse its contractors for costs incurred.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23d day of January 2002.

(ILLEGIBLE)
THOMAS RAMEY

STATEMENTS OF ASSETS, LIABILITIES AND FUND BALANCES

(MODIFIED CASH BASIS, NOTE 2) SEPTEMBER 30, 2001 AND 2000

ASSETS	2001	2000
CASH AND CASH EQUIVALENTS (Notes 2 and 3)	$ 663,464	$ 1,926,557
SHORT-TERM INVESTMENT (Note 3)	25,468,729	26,305,128
EQUIPMENT, net of accumulated depreciation of $47,766 and $57,049, respectively (Note 2)	13,552	9,503
OTHER	1,106	1,276
Total assets	$ 26,146,851	$ 28,242,464
LIABILITIES AND FUND BALANCES		
DUE TO STATE BEEF COUNCILS AND OTHER COMMITMENTS (Note 2)	$ 754	$ 944
FUNDS BALANCES (Note 5):		
Appropriated for budgeted expenditures	15,074,044	16,589,509
Board reserve	5,000,000	5,000,000
Unappropriated	6,058,501	6,642,508
Investment in equipment, net	13,552	9,503
	26,146,097	28,241,520
Total liabilities and fund balances	$ 26,146,851	$ 28,242,464

STATEMENTS OF REVENUES AND EXPENSES AND CHANGES IN FUND BALANCES

(MODIFIED CASH BASIS, NOTE 2) SEPTEMBER 30, 2001 AND 2000

REVENUES:	2001	2000
Assessments (Note 1)	$ 47,469,581	$ 48,068,845
Interest	1,820,563	1,607,962
Other	24,383	24,465
Total revenues	49,314,527	49,701,272

EXPENSES:		
Program		
Promotion	29,976,379	29,028,696
Research	5,132,907	4,284,065
Consumer Information	4,868,427	6,809,609
Industry Information	1,706,150	1,948,653
Foreign Marketing	5,064,770	4,801,628
Producer Communications	2,558,901	1,854,930
Program Evaluation	67,441	136,411
Program Development	119,877	84,744
Total Program Expenses	49,494,852	48,948,736
USDA Oversight	169,988	176,502
Administration (Note 4)	1,745,110	1,644,635
Total expenses	51,409,950	50,769,873
Deficiency of revenues over expenses (Note 2)	(2,095,423)	(1,068,601)
BEGINNING FUND BALANCES	28,241,520	29,310,121
ENDING FUND BALANCES	$ 26,146,097	$ 28,241,520

The accompanying notes to financial statements are an integral part of these statements.

Agricultural Marketing Service

DIRECTIVE 2210.2 5/1/98

INVESTMENT OF PUBLIC FUNDS

I. PURPOSE

This Directive states the policy and responsibilities for investment of public funds maintained by the Agricultural Marketing Service (AMS).

II. REPLACEMENT HIGHLIGHTS

This Directive replaces AMS Directive 433.1, Investment of Public Funds, dated 11/30/92.

III. AUTHORITIES

A. Title 31, Code of Federal Regulations (CFR), Parts 202-226, "Money and Finance: Treasury."

B. Volume I, Treasury Financial Manual 6-9000, "Securing Government Deposits in Federal Agency Accounts."

IV. DEFINITIONS OF TERMS

A. *Agency*—Any Department, Agency, or instrumentality of the U.S. Government.

B. *Designated Depositary*—A financial institution designated by the Department of the Treasury as a depositary and financial agent of the Federal Government and selected by an agency to hold public funds.

C. *Federal Reserve Bank of the District*—The Federal Reserve bank or branch of the district in the geographic area in which the agency's designated depositary is located.

D. *Government Deposits*—Public money, including, but not limited to, revenue and funds of the United States and deposit funds subject to the control or regulation of the United States or any of its officers, agents, or employees.

E. *Recognized Insurance Coverage*—The insurance provided by the Federal Deposit Insurance Corporation (FDIC), National Credit Union Share Insurance Fund, and the insurance organizations specifically approved by the Secretary of the Treasury under Title 31, CFR, Part 226.

V. POLICY

It is AMS policy to:

A. Exercise prudent cash management of funds collected through fees for services, assessments collected from handlers and producers to finance research and promotion efforts, and assessments collected to administer marketing agreements and orders. This also applies to payments received by producer settlement funds and interest or

other charges collected on overdue accounts.

B. Require that a formal agreement or Memorandum of Understanding be signed between the parties before funds are deposited with a financial institution. This agreement is to state the responsibilities of both the custodial agency and the financial institution, and must conform to the policies and guidelines established by the U.S. Treasury with respect to deposits of, and collateral for, public funds.

C. Require complete safety of invested funds. In this regard, AMS adheres to U.S. Department of the Treasury Regulations, Title 31, CFR, Parts 202-226.

VI. RESPONSIBILITIES

A. In AMS, public funds are maintained by the Budget Office, the Research and Promotion Boards, Milk Market Administrators, and the Fruit and Vegetable Marketing Order Administrative Committees. They are the fund custodians for AMS. When invest ing funds held in public trust, fund custodians must follow these guidelines:

1. Investments. All investments must be short-term, risk-free, interest-bearing instruments.

a. Short-term. All investments must have a maturity period of 1 year of less to ensure availability and rapid conversion of the principal to cash.

b. Risk-Free. All investments must be Federally insured or fully collateralized with Federal Government securities.

2. Insurance Coverage. All investments must be fully secured. Accounts are to be established at financial institutions having FDIC insurance. Accounts at individual institutions should total, in the aggregate, less than $100,000 to ensure full insurance for both principal and interest.

3. Collateralization. All investments exceeding $100,000 with FDIC-insured institutions must be fully collateralized.

a. Before sending funds to any institution for investment, eligible collateral must be pledged to an account under the control of the investing custodian.

b. Only those securities specified in U.S. Department of the Treasury Regulations, Title 31,

CFR, Part 202, are acceptable collateral. They include collateral issued, fully insured or guaranteed by U.S. Government Agencies or U.S. Government sponsored corporations. No declining balance securities, regardless of issue, are acceptable.

c. Collateral must be pledged at face value. Financial institutions must provide the investor with periodic inventories of pledged collateral, showing both face and market value.

d. Collateral must be pledged and separately segregated in the name of the investor (i.e., AMS-Budget Office, Board, Milk Market Administrator, or Administrative Committee), to prevent double pledging.

e. Collateral not held by the Federal Reserve Board must be held by a financial institution authorized by Treasury as a Federal Depositary, having FDIC insurance, and approved by the Federal Reserve Board.

f. AMS investment records should be kept for 6 years and 3 months, as required by the AMS Records Management Program.

B. The *Compliance Office, Compliance and Analysis*, will conduct at least two reviews of the investment decisions process for the AMS investment program per year. Investment authorities outside the AMS investment program will continue to be reviewed as outlined in their investment authority.

C. All *employees* authorized to conduct business with any financial institution participating in the AMS investment program must sign a disclosure statement indicating any personal relationships with those financial institutions. In addition, they will be required to complete an annual Confidential Financial Disclosure Report (SF-450).

VII. INQUIRIES — Direct inquiries to AMS, Compliance and Analysis, Budget Office.

Enrique E. Figueroa, Ph.D.
Administrator

IN THE UNITED STATES DISTRICT COURT
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NEBRASKA CATTLEMEN'S ASSOCIATION, ET AL.,
INTERVENOR-DEFENDANTS

AFFIDAVIT OF RONALD W. WARD

STATE OF FLORIDA)
: SS
COUNTY OF ALACHUA)

I, Ronald W. Ward, your Affiant, being first duly sworn on oath, depose and state as follows:

1. That your Affiant provided this affidavit based upon his personal knowledge and experience as an agricultural economist. If called as a witness to testify in the above-referenced case, your Affiant could competently testify to the facts set forth herein.

2. That your Affiant's education, professional accomplishments, publications, and related matters are accurately stated and made part of his resume, a copy of which is attached hereto and incorporated herein by reference.

3. That your Affiant's opinions related to the Beef Promotion and Research Act, and the Beef Promotion and Research Order, are accurately stated in his report dated October 11, 2001, a copy of which is attached hereto and incorporated herein by reference.

4. That the basis upon which your Affiant has formed his opinions, as contained in his report dated October 11, 2001, are all materials and sources upon which professionals within the field of agricultural economics customarily rely.

5. That the opinions expressed in your Affiant's report dated October 11, 2001, are stated within a reasonable degree of certainty in the field of agricultural economics.

6. The methods, and the statistical and economic models, used to reach the conclusions and opinions expressed in your Affiant's report are typically used by agricultural economists, and have been proven to be reliable.

7. That your Affiant does hereby declare under the penalty of perjury that the foregoing is true and correct.

Dated this 17 day of October, 2001.

/s/ RONALD W. WARD
RONALD W. WARD

Expert Testimony by
Ronald W. Ward, Professor
University of Florida

Re: Livestock Marketing Association, et al. v. United States Department of Agriculture, et al., CIV. 00-1032

Date: October 11, 2001

Signature: /s/ Ronald W. Ward

I am a full professor of agricultural economics at the University of Florida and have been on the staff since 1970. My educational background includes a B.S. degree in agricultural economics from the University of Tennessee (1965); a M.S. degree in agricultural economics from Iowa State University (1967); and a Ph.D. in economics and statistics from Iowa State University in 1970. From 1970 to 1976 I also had an appointment with the Florida Department of Citrus as a research economist working much of the time on generic advertising issues with the citrus industry. In 1976 I moved over full time to the university even though I was located in the department since 1970. I teach graduate courses in econometrics and agricultural market structures. Most of my research time is dedicated to dealing with commodity promotion issues, working on both domestic and international issues associated with demand and the impacts of promotions. Over the last several years I have worked with many of the commodity boards in both a research and advising capacity. Some of the more recent activities include work with the Cattlemen's Beef Research and Pro-

motion Board; Washington Apple Commission; Promo-Flor; Flower Promotion Organization; Florida Citrus Commission; National Dairy Board; National Watermelon Commission; Meat and Livestock Commission of the United Kingdom; International Tea Group of FAO, Rome; University of Gent, Belgium; University of Madrid, Spain; Mushroom Promotion Board; California Almond Board; etc. I testified in both the Almond and Mushroom cases when there were challenged in the late 90's. Every other year I give a two-week seminar on commodity promotions at the Institute of Mediterranean Agronomics in Zaragoza, Spain (Ward, 1997). Also, my graduate class at the University of Florida includes a section on commodity promotions. In 1993 I coauthored the book "Commodity Advertising: The Economics and Measurement of Generic Programs" and this book is the only comprehensive reference dealing exclusively with generic advertising (Forker and Ward, 1993).

Much of my comments below are based on my experience with the beef programs where I have had a contract to evaluate the programs using various econometric modeling techniques. This work has been ongoing since the late 1980's when the beef program first stated (Ward, 1999; Ward, Moon, and Jauregui, 1996; Ward and Lambert, 1993). The research has evolved over the years and I draw from the current and past studies. At this moment I am concurrently working on generic promotion projects dealing with U.S. beef, watermelons, flowers, grapefruit, U.K. beef, Belgium beef, Spanish olive oil, and black tea through FAO. I have traveled throughout the U.S. and foreign countries giving lectures and seminars on commodity promotions. In September I returned from England

where I completed commodity promotion seminars to the U.K. Meat and Livestock Commission and the U.K. Agricultural Economics Society.

* * * * *

Theoretically, any producer could promote his/her product with or without the existence of an industry wide generic program and there is nothing in the enabling legislation prohibiting individual action. However, two aspects of many agricultural goods make that decision often prohibitive. First, the cost of a meaningful promotion program to an individual is likely so large that it is an impractical option except in those cases where the producer has a large share of the market. Secondly, given that the product has little differentiation then even if one producer is successful in funding a promotion program there is a "free-rider" problem where others benefit without sharing in the costs. Given both the high entry cost for developing a meaningful promotion program and the free rider issue, for many industries the only option is to fund an industry wide effort with a program designed to have equitable benefits to all producers. This effort could be on a voluntary basis but will create problems with the equity since some may [choose] not to participate even though they benefit equally, assuming the program is beneficial. The alternative is for government involvement through providing the legislative authority and oversight for a mandatory program subject to periodical review and vote. That is precisely the current status of most of the national checkoff programs existing in the U.S. Without this alternative it is impractical if not impossible for producers within some industries to address the informational needs for the good of the total industry. That is, the promotions simple could not

take place because of the high entry cost and the equity concerns in terms of free riders. Allowing each individual the choice to participate (e.g., allowing refunds or voluntary) becomes a major barrier to allowing the industry to fund an equitable joint effort. In turn this may prohibit many smaller producers from having any option to communicate with consumers (i.e., to speak.)

* * * * *

Given this setting, I have been asked to address the specific of the beef checkoff and the importance of the beef industry to the U.S. economy and the overall benefits of the beef checkoff programs. In the following sections I will address these issues. I feel particular[ly] qualified in addressing the economic impact of the current beef checkoff promotions since I have been responsible for doing the economic evaluation of the programs for some time.

Importance of the Beef Industry to the U.S. Economy

The U.S. beef industry is one of the larger agricultural sectors with production spread throughout most of the U.S. Over the last two decades there has been an average slaughter of 8.8 million head per quarter (see Figure 1) with around 79 percent being fed cattle versus cows, bulls, and others. Total agricultural farm marketing since 1980 have ranged from $139 billion to more than $200 million annually (see Figure 2) and the beef sector generally accounted for 15 to 25 percent of the expenditures depending on the year (USDA). From 1980 through 1999, farm marketing of beef and calves total $677 billion and represented 20.6 percent of the total U.S. farm marketings. Furthermore, over the decade of the 90's at least 80 to 85 percent of U.S. households reported including some beef in

their in-home consumption within a typical two-week period (Ward, 2001). It is clear that beef is of substantial importance to the nation given the wide geographical distribution in production, its share of the agricultural marketing value, and its importance to the diet of the majority of U.S. consumers. Hence, there is clear and compelling reason for the government to have substantial interest in the viability of the industry. One can look to the government's quick preventive response to issues associated with foot-n-mouth disease and BSE in Europe to see the value of the industry to the nation and to cattle producers. Beef is a vital part of the U.S. food chain and to the underlying industries supporting the production of beef and its distribution.

* * * * *

Impact of the Beef Checkoff

Given the importance of beef to the nation and the existence of the beef checkoff, then the most fundamental question is if the existing beef promotion programs have had a measurable impact on demand for beef. If they have not, then the free rider issues would not be germane since there would be no gains to be realized. Therefore, the ability to measure the impact of the promotion is central to the legal issues. I have completed the analysis of the beef program for several years and finished the latest evaluation in February, 2001.

* * * * *

There is overwhelming evidence using three independent econometric approaches that the beef checkoff has had a measurable and statistically significant impact on the demand for beef. Following arguments by

Nichols, the positive response provides clear evidence that consumers value the information through their response in demand (Nichols, 1985).

Let me turn two graphs to illustrate the impact of the beef checkoff on demand at the retail level. Figure 8 shows the change in beef demand based on the household eating model and Figure 9 shows the same for the household servings model. The bottom left axis shows a range of retail beef prices and the bottom right axis gives the range of quarterly beef promotion expenditures. Then the vertical axis shows the changes in beef demand over both prices and checkoff expenditures. Movements along the right axis and the corresponding increase in the vertical axis (i.e., beef demand) illustrates the gain in retail beef demand that is directly attributed to the beef promotions. These two household models provide independent evidence of the statistically significant impact of the beef checkoff on retail demand for beef as seen with the rising demand as promotion expenditures are increased. Clearly, the two models point to gains in beef demand either in pounds per capita or servings per household member. Claims that the program does not have a measurable impact are simply not supported by the statistical evidence.

* * * * *

Using these time series model estimates (see Table 2), cattle prices were simulated with and without the checkoff expenditures. Liveweight revenues with and without the beef checkoff efforts were than calculated over the full life of the program since 1987 with and without the beef checkoff (Ward and Lambert, 1993.) From 1987 through the first quarter of 2000, total re-

venues back to cattle producers for slaughter sales were predicted to be $321.18 billion. These revenues were calculated to drop to $314.72 billion without the beef checkoff, giving a difference of $6.46 billion. The $6.46 billion represents the added revenues directly attributed to the beef checkoff for slaughter cattle sales. All checkoff assessments were totaled and subtracted from the total gains and then the net gains were divided by the same assessments. This method of calculating the rate-of-return gave a value of 5.67 to the beef checkoff. On average, for each dollar spent on the checkoff assessments, an additional 5.67 net gain to producers was estimated based on the time series approach. These estimated gains are comparable to those calculated using the beef servings model discussed above. Also, the 5.67 rate is the number most frequently quoted by the industry as the average gains attributed to the beef checkoff.

While the result above represents the most recent evaluations including the broader approaches, earlier evaluations have consistently pointed to rates-of-return comparable to the 1 to 5 range indicated above.

Given the marginal returns of 1 to 5.6 with the servings model and the average rate-of-return of 1 to 5.67 for the time series model, my conclusion is that the beef program is in fact underfunded. Clearly, they have not overspent if one uses the marginal gains as an indicator. Expenditures could be increased by more than 50 percent before the marginal and average gains approach a level of one (i.e., a dollar of promotions just returns a dollar of expenditures back to producers.) Furthermore, over the life of the beef checkoff approximately 2.9 percent of the funds went to administrative overhead and 2 percent for producer communication. These

administrative costs are less than the relative levels seen for many other commodity programs (Forker and Ward, 1993). I am not in a position to outline all the details including in the 2 percent producer communication. However, based on the rates-of-return and budgeted expenditures, my conclusion is that the programs are not more extensive than needed to meet the government interest in the programs (Ward, 2001).

My overall conclusion from extensive evaluation of the beef programs over several years is that the programs have had a positive economic impact on the demand for beef and that impact can be measured with statistical confidence. Compared with other generic programs, the rate-of-return is consistent with gains shown for many other commodity programs (Forker and Ward, 1993; Ward, 1997).

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

No. 00-1032

LIVESTOCK MARKETING, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., DEFENDANTS

TRIAL TRANSCRIPT

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[Volume 1]

[Testimony of John Smillie – Excerpts]

[18]

* * * * *

JOHN SMILLIE, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

* * * * *

Q Would you introduce yourself to the Court and tell him what you do.

A Yes. My name is John Smillie. And I'm the Program Director for the Western Organization of Resource Councils in Billings, Montana.

Q And does that association go by an acronym?

A Yes. We're known usually as WORC.

* * * * *

Q Does WORC have individual members?

A No. WORC is a regional network of grassroots community groups of now seven western states.

Q Is one of those states South Dakota?

A Yes.

Q What are the other states?

A Montana, North Dakota, Wyoming, Colorado, Idaho, and now Oregon, eastern Oregon.

* * * * *

[20]

* * * * *

A Well, quite some time ago we did research into commodity [21] * * * checkoff programs. And then, oh, approximately three, four years ago we took a position at WORC based on the positions of our member groups that we believed that the checkoffs should not be mandatory and we began working to try to reform the checkoffs so they were no longer mandatory checkoffs.

Q Mr. Smillie, is it fair to say that one of the important issues to WORC is the promotion of the economic interests of the United States cattle producers?

MR. LEV: Objection. Leading, Your Honor.

THE COURT: Overruled.

A Yes, that's right. One of our purposes is to promote just, and sustainable, and viable, and strong

communities in our states and, so, we're always working for the kind of, you know, economic development, economic structures on our communities that our members support.

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[24]

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Q Focusing just on the three bundles that you've seen there, that is Exhibit A to the Joint Stipulation, the first bundle we showed you, and then Plaintiffs' 26A through L, and Plaintiffs' 27A and B, in examining those, Mr. Smillie, could you find any message promoting the interests of American beef as distinct from foreign imported beef?

A I don't believe I saw anything in those exhibits relating to that.

Q Specifically focusing on that promotion as it occurs here at home?

A Correct. Not to American consumers, no, I did not see that.

Q Does your organization object to that message?

A We do.

Q Can you explain to the Court why you object to that message?

A Well, we support the promotion of U.S. beef, of offering American consumers the choice of producing beef produced from American cattle. And, so, the promotion of generic [25] beef from either the U.S. or overseas doesn't fit with what we think should be promoted.

Q Mr. Smillie, are your members, that is, the members, individual members of WORC, to the beef checkoff compelled to associate with an entity called the NCBA?

A We believe they are.

Q What does the NCBA stand for?

A The National Cattlemen's Beef Association.

Q And how is it that they're compelled to associate with the NCBA?

A Well, we believe that the checkoff dollars that make up a large part of the NCBA's budget help support the organization. And it promotes positions with which we disagree and it opposes positions and issues that we favor.

* * * * *

Q Now, in examining the three bundles of documents that you testified are representative of the message purchased with beef checkoff funds, were you able to identify any of those messages that indicated the sponsorship by the United States Government?

[26]

A I don't recall seeing anything like that in those messages, no.

Q You've testified that because of the beef checkoff your members are compelled to associate with the NCBA, is that correct?

A Correct.

Q You testified that you object to that association?

A Yes.

Q And you said, I think, there were political positions that the NCBA had taken with which your organization disagrees, is that right?

A That's right.

Q Can you identify those positions?

A Ah—

Q Other than what you've already testified.

A. Correct. Well, one is the support of the mandatory checkoff.

But we—WORC supports, for example, country-of-origin labeling for any animals born, raised, and slaughtered in the United States. Ban on packer ownership of cattle. Other regulation of what are known as captive supplies of cattle. We had a petition for rule making to the United States Department of Agriculture for a way to enforce the Packers & Stockyards Act concerning those captive supplies that was opposed by the NCRA. The NCRA takes positions on [27] trade issues that are different from those that our members support.

Q Mr. Smillie, would you say that the economic interests of the United States cattle producers as distinct from foreign producers is germane to WORC's overall purpose?

A Well, yes. Our interests are in promoting, again, strong rural communities and in just economic systems and in promoting the economic interest of the cattle producers who are members and live in the communities in which we're organized. And to do that we promote—promoting their economic interest means promoting the cattle—beef from the cattle they produce as opposed to beef from either imported directly

or from cattle that are imported that's basically competition to them.

Q And is that why you have become involved as a plaintiff in this case?

A Well, we became involved as a plaintiff in this case because we believe that, again, the checkoff was not in our members best interests. We didn't support a mandatory checkoff. And, so, we had attempted to end the mandatory checkoff by working for a referendum to get a vote of the producers. And then we joined in again because we believe that there should be a mandatory checkoff. We joined also with the complaint alleging that the checkoff unconstitutional as forced speech.

[28]

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CROSS-EXAMINATION

[29]

BY MS. McKEE:

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[38]

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Q With whom at USDA did you share this view?

A We wrote concerning our objections to the association with NCBA and requesting an audit. I don't know what year that was.

* * * * *

[39]

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CROSS-EXAMINATION

BY MR. BREWERS:

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[44]

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A Well, we've been very strong supporters of country-of-origin in labeling which both the USDA and NCBA have opposed in the form that we have promoted it. And if you don't label beef by its country-of-origin it's very hard to promote it to the consumer in the United States as U.S. beef as opposed to foreign beef.

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[47]

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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[49]

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Q Finally, you talked a little bit about whether, in response to Mr. Brewers' question, whether you object to the foreign marketing of U.S. products with checkoff dollars. Do you remember that question?

A Yes.

Q And you said you thought it should apply also to the United States.

A Correct.

Q But it doesn't, does it?

A Not to my knowledge.

Q In fact, the marketing of beef through checkoff dollars is, as it relates to this market in the United States, entirely generic?

A Yes.

Q Your members object to being compelled to pay for that?

A They do.

* * * * *

[Testimony of Nancy Robinson – Excerpts]

[50]

* * * * *

NANCY ROBINSON, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

Q Would you introduce yourself, please, to the Court.

A Your Honor, I am Nancy Robinson. I'm Vice President for Government and Industry Affairs for the Livestock Marketing Association.

* * * * *

[51]

* * * * *

Q What is LMA?

A Livestock Marketing Association is a national trade organization that represents livestock auction markets, commission firms, dealers, order buyers, and other related business. We provide services to our member businesses, as well as look out for the general condition of our market customers, which are livestock producers in the United States.

* * * * *

Q Of the 800 members, Nancy, do you have a rough idea of the number of those who are also cattle producers?

A Well, based on our experience, we would say that there is at least 90 percent of our members that have some type of cattle production operation.

* * * * *

[52]

* * * * *

A I would say 90 percent or more, probably.

* * * * *

Q Is it fair to say that in your involvement with LMA that's the subsection that most clearly defines what you do?

A Absolutely.

Q And that's to improve the condition of persons engaged in the business of the livestock industry?

A Yes.

Q That would include both sale barns and cattle producers?

A That's right.

[53]

* * * * *

Q Nancy, would you describe for the Court just generally the involvement LMA has had in the beef checkoff issue.

A Well, not only are LMA members market and dealers, and markets, in particular, and commission firms, collectors of the checkoff, the principal collector, actually, of the checkoff, but we also, as many of them being cattle producers, pay into the checkoff as well.

Q Is it fair to say, Nancy, that one of the purposes of LMA is to promote the economic interests of cattle producers in the United States?

* * * * *

[54]

* * * * *

A Yes. If they don't prosper our market doesn't prosper.

* * * * *

Q I'm going to ask you to direct your attention to the exhibits previously looked at by Mr. Smillie, and they are there on the bar before you at the witness desk, and they are identified as Exhibit A to the Joint Stipulation of Facts, Plaintiffs' Exhibit 26A through L,

and Plaintiffs' Exhibit 27A and B. Can you identify those exhibits as such, Ms. Robinson?

A Yes. They are beef promotion ads, producer communication ads that are paid for with checkoff dollars.

Q Have you had the chance to review those documents prior to coming to court?

A Yes.

Q Do you believe those documents are representative of the messages purchased by the beef checkoff, based on your experience?

A Yes.

Q And in examining those documents, Ms. Robinson, could [55] you find any message purchased with these mandatory assessments directed to promoting cattle producers in the United States as distinct from foreign importers here at home?

A No, they are all generic messages.

Q Did you find any reference in any of those messages to them being responsored by the United States?

A No.

Q Any government entity?

A No. They're sponsored by the CBB, which is, you know, the beef promotion, administers the Beef Promotion Act.

Q Do the members of LMA object to the absence of a distinction between American cattle producers and foreign importers as contained in the documents?

* * * * *

A Yes.

Q —Ms. Robinson?

A Very much so.

Q Would you explain to the Court why.

A Well, again, these are generic messages that do not promote U.S. beef which we believe to be superior to imported beef and, therefore, we object to any message that does not promote U.S. beef.

Q What makes you think that United States beef is [56] is superior?

A Well, I think you could ask anyone in the United States, in particular the cattle producers that produce our cattle, that it's superior in quality and taste, and in their production methods.

* * * * *

Q Why wouldn't it be sufficient for the beef checkoff to do what it's doing, to support generic advertising, to place foreign imports and American beef on the same level?

A Because imported beef is not as good a product as we produce in this country. And our producers should not be compelled to pay for saying that it is as good.

Q Nancy, what is the NCBA?

A The NCBA is the National Cattlemen's Beef Association. They are a national trade association of cattle producers.

Q Is it a government entity?

A No.

Q Is it an industry organization?

A Yes. Like LMA.

Q Do you know what the projected revenue is for the NCBA for the year 2002?

A I believe it's about 62.5 million.

[57]

* * * * *

Q Ms. Robinson, are you generally familiar with the budget statistics involved in the beef checkoff?

A Yes.

* * * * *

Q What do you know to be the projected percentage of revenue for the year 2002 for the NCBA made up of checkoff funds?

* * * * *

[58]

* * * * *

A $54.4 million. If you include both the CBB revenues and State Beef Council investments.

Q Do you know how much the beef checkoff is expected to generate for the year 2002?

A I believe they estimate 45 million.

Q The entire checkoff?

A Well, that's the national portion. Obviously another 45 million would be on the state portion of the 50 cents portion.

Q So of that portion, the amount that you know to be projected as revenue for the NCBA is something over $50 million?

A Yes.

Q And that's a private entity?

A Yes.

Q Do your members object to being compelled to associate with the NCBA?

A Yes. We often disagree on policy issues. That we feel as a result of the merger of the dues policy side of the organization with the checkoff promotion side that their policy positions are enhanced through those checkoff dollars that go into the organization.

* * * * *

[60]

* * * * *

Q Then why is it that you believe the fire wall is not intact between those two entities?

A Well, for one thing, in our view the organization is seamless in that the staff on the policy side is also doing checkoff projects, whether it's promotion, or research, industry communications, etc.

Q Is what you've just testified to with regard to those two entities within NCBA a part of why LMA is opposed to being compelled to associate with them?

A Yes.

Q Are there any other reasons?

A Well, again, they often—or, not often, but they do at times take policy positions of which we do not support.

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[61]

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Q Is it fair to say, Ms. Robinson, that one of the purposes of LMA is to promote the economic interests of American cattle producers?

A Yes.

* * * * *

THE COURT: Ma'am, did I understand your testimony that the checkoff nationally raises about $62 million?

A The projected budget for the national portion is 45 million, I believe. Then the states receive 50 cents of the dollar checkoff, so another 45 million. Then they also, at least in the revenues of the checkoff division of the NCBA, they also receive, as well as CBB national revenues, they also receive State Beef Councils investments. In other words, state funds moved to the national.

THE COURT: Let me ask the question again. What's the $62 million?

A The $62 million is their total revenues. Again—

[62]

THE COURT: $62 million is whose total revenues?

A The NCBA's.

THE COURT: And of the 62 million revenues to the National Cattlemen's Beef Association, about 54.4 million comes from checkoff funds?

A Right.

* * * * *

Q What is the Beef Operating Committee?

A Well, I consider them the management arm of the Cattlemen's Beef Board in that they are the ones that determine what projects are funded.

Q How many members are on the Beef Operating Committee?

A Twenty members.

Q Where do those members come from?

A Ten come from the Cattlemen's Beef Board and 10 come from the Federation of State Beef Councils.

Q Are any of them—do any of them require appointment by [63] the Secretary of Agriculture?

A The 10 members of the Cattlemen's Beef Board.

Q And the other 10 do not involve the USDA process?

A No.

Q They are just from this private organization, the NCBA?

A Yes. And from the Federation of State Beef Councils.

Q Is it fair to say that neither the government nor the NCBA has a majority vote on the Beef Operating Committee?

A Well, certainly the government doesn't. I might argue with you about whether NCBA does.

Q And the purpose of the Beef Operating Committee is what?

A Again, they are responsible for approving budgets, and priorities, and projects for the Cattlemen's Beef Board.

Q So if I, myself, go to the entity and I've got an idea of a project I'd take it somehow eventually to the Beef Operating Committee, right?

A Right. Yeah, you'd bring it up through the Advisory Committee for the NCBA to the Beef Operating Committee.

Q And they would make the decision?

A And they would make the decision.

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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[86]

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Q Do you have any idea why we simply can't use checkoff dollars in the United States to promote American raised beef here?

A No, I don't know why we don't. That's what we should be promoting.

Q And, instead, what we have is a system of generic promotion, is that correct?

A That's correct.

Q So in foreign markets it's okay to label a product as American but here at home with use of checkoff dollars that's strictly forbidden?

A That's right.

Q And your membership objects to that, doesn't it?

A That's correct.

* * * * *

[Testimony of Patrick K. Goggins – Excerpts]

[89]

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PATRICK K. GOGGINS, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. HEIDEPRIEM:

[90]

Q Would you introduce yourself to the Court, please Pat.

A I'm Patrick K. "Pat" Goggins from Billings, Montana.

Q What do you do in Billings?

A I'm in the livestock business, both as a grower, a breeder of livestock, and owner of a livestock market. I develop, background, and feed cattle.

Q You are subject to the mandatory assessment of the beef checkoff, I take it?

A Yes, sir.

Q Are you a member of LMA?

A I am.

Q Do you hold any leadership position in LMA?

A I'm currently the president of LMA.

Q As president do you help formulate positions of the association and decide when the association should become involved?

A Yes.

Q I take it their involvement here in this First Amendment claim is with your approval?

A Yes.

Q Would you describe for the Court in your own words what you believe the purpose of LMA to be.

A Well, Livestock Marketing Association, there's some 1200—not quite 1200 markets in the United States in which a few over 800 are members. These are markets, and marketers, [91] and order buyers. People who are in the business of price discovery. And we're very—we're very sure that price discovery is the most important part of a cattleman's monetary being. And we attempt very much to get a fair price for his product.

* * * * *

Q Would it be fair to say, Mr. Goggins, that the promotion of the economic interests of the American cattle producer is one of the matters of importance to LMA?

* * * * *

A It's foremost.

* * * * *

[92]

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Q You testified already that you, as a cattle producer, are subject to the mandatory assessments of the checkoff, right?

A Yes.

* * * * *

Q And you were a part, obviously, of the decision to become involved in this challenge to compelled speech?

A Yes.

Q In the course of your experience as a cattle producer and a livestock market man have you had the chance to see the messages purchased with beef checkoff funds?

[93]

A Yes.

Q Sitting before you by the microphone are three packets, and I will simply ask you, you've previously to court today had a chance to examine those three exhibits representing examples of beef checkoff messages?

A Yes.

Q Were they representative of other messages you had seen in the course of your life as a cattle producer?

A Yes. They're generic in order.

Q They're consistent with other things that you've seen, whether they are included in those packets or not?

A That's right.

* * * * *

Q In your examination of those exhibits, being Exhibits A, 26, and 27 and their subparts, did you see any message promoting American cattle producers as distinct from foreign imported producers?

A No. None.

Q Do you object to that?

A Very much.

Q Would you describe to the Court why you object?

A Well, when you—the trend we're on of promoting, for instance, "Beef, it's what's for dinner," a good ad, except [94] that beef is a generic term. And the more you promote beef consumption here in the United States the more you create demand for foreign beef.

Q Do you believe foreign beef imported in the United States is increasing?

A It is increasing handedly.

* * * * *

[Q] Have you described all the ways in which you disagree with the message that you observe in those exhibits?

A Yes. You get—we get to a position where we keep it a generic policy. For instance, I run a lot of cows. I'm a breeder of livestock. And I have been for 50 years. And I've been a member of NCBA. They

used to be ANCA, and then NCA, and then NCBA. But I've been and still am a member. And I'm one of many who resent, very much resent the idea that we in the United States, superb beef, are not allowed to see our national organization promote United States beef to United States people. Why do we use checkoff dollars to promote United States beef to Japan and to other foreign nations? We don't go over there and say eat some beef. No, no. We go over there and say eat fine U.S. beef. This does not happen in the United States. So, the more we promote the generic beef, I'm compelled, as a payer of the dollar checkoff, I'm compelled by law to [95] promote and pay for the promotion of foreign product. And it is an inferior product if it is not blended, especially the ground product. What makes it good is the blend they use from the trim of the fed carcass. That makes a wonderful luscious sandwich. But I'm paying for it, and I resent that.

Q Mr. Goggins, you raised an interesting question. When an American—if you and I went to Kessler's Market here in Aberdeen, South Dakota, today and we looked in the meat case could we tell whether a cut of meat was the United States or from Brazil?

A No.

Q Are they all stamped by the USDA?

A If it's been a graded product they are. But there's quite a lot of no roll as well in there. But if it's been through the USDA roll it would be stamped. Much of it may be USDA select, or standard, whatever. Many could be an imported product, no one knows.

Q Do you believe that the products raised by American cattle producers are superior, by and large, to foreign imports?

A Far superior.

Q Is that a position that you've held for a long time?

A All my life.

Q You are opposed to being compelled to subsidize a [96] message that treats them as roughly equivalent?

A Well, yes. Generically if you just advertise beef you are advertising beef worldwide. But why, I ask, do we not promote U.S. beef here in American just like we're promoting it abroad?

Q Mr. Goggins, in reviewing those beef checkoff purchased messages, which are the exhibits I've previously talked about, did you see any suggestion there that that was messages from the United States Government?

A No.

Q You're aware that the United States makes the claim that this is a matter of government speech and, therefore, exempt?

A The United States does? Or who is making that claim?

Q The defendants in this case.

A The defendants, all of them, yeah.

Yes, I'm aware of that. And there's a very huge amount of resentment on the part of the folks I've talked to across western American, especially many, many ranchers and feeders who have been paying in the dollar checkoff, all of a sudden are led to believe that all of their money has been going toward "government speech." And I am getting a real huge feedback from across America very resentful of being paid as dollars creating government speech.

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[98]

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Q In the course of your work with LMA has your organization opposed positions taken by the NCBA?

A Yes.

Q Can you describe for the Court the difficulties you've had?

A The difficulties have been—well, I was a member of several committees through the years of the old NCA and then the NCBA, and it was, for instance, in the policy making and through the resolution, the way things work in committee, good idea, nothing wrong with it. But I remember being in the marketing meeting, big full house, room about this big, full, and there's quite a query, quite a lot of cattlemen and folks there had a great amount of thoughts on their mind about imported beef and what was happening to us. And the questions would come along. The chairman would be up at the [99] desk and his secretary. But the person sitting in the front row fielding all the questions was Bruce Bass, the head buyer for Iowa Beef Packers. And it was quite resentful for a lot of people there that he, as a member of a packing group, would be fielding the questions and doing the answering. And things like that go on, you get steamrolled. You just cannot get something done. And this is being reflected, I think, in some of the states that are pulling out, they're pulling away.

Q Excuse me. Mr. Goggins, there's been testimony here, or questions, anyway, about an alleged fire wall

between the Policy Division of NCBA and the Federation Division. Have you heard that testimony?

A I've heard that. But if there is, I've never been able to witness it or even see it.

Q Do you believe there is such a fire wall separating those divisions?

A It's one of a myth. I do not believe it actually exists.

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CROSS-EXAMINATION

BY MR. LEV:

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[100]

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Q And I've come to learn that you're a cow-calf operator and one of the largest beef stock producers in the country, is that right?

A That's right.

* * * * *

[101]

* * * * *

A Formal, no. But my involvement with it for a lot of years I don't know of one operator or owner that does not own livestock, or run cattle on grass, or feed some cattle, or have a cow herd, or all of the above.

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[108]

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REDIRECT EXAMINATION

BY MR. HEIDEPRIEM:

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[109]

* * * * *

A This lawsuit, of course, I think come along because of the dissention, the split, and it's unfortunate that there's a split and the wound has been so deep and I resent that very much. Because I really believe in the American cattle industry.

Q You go on to say in that column that you believe there should have been a referendum, right?

A Yes.

Q Do you believe, Mr. Goggins, that beef checkoff dollars should be used to promote a generic message about beef whether it's American raised or foreign?

A No.

Q Would you support a beef checkoff program, even if there was a referendum on it, if it continued to promote beef generically?

A No.

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[Testimony of John L. Smith – Excerpts]

[111]

* * * * *

JOHN L. SMITH, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you introduce yourself to the Court.

A My name is Johnnie Smith. And I'm from Fort Pierre, South Dakota.

Q Are you a cattle producer, John?

A I'm a cattle producer, and I raise cattle, and I also have a partnership in an auction market.

Q Do you pay the beef checkoff every year?

A Yes, I do.

Q Are you a member of LMA?

A Our market is a member of LMA.

Q Are you a member of NCBA?

A Not any more.

Q What happened?

A Well, I just thought that they weren't—they weren't—didn't have the best interests of the producers in mind and they were affiliating with the major feedlots, [112] and the packing industry, and the retailers and I thought it was a waste of time to try to help an organization that was against the producers or paying the dollar.

Q Are you a member of R-CALF[?]

A Yes, I am.

Q Would you tell us about what R-CALF is.

A R-CALF is a new organization for the producers. Started out in Montana. And it's an organization that has been lobbying Congress and trying to get things better and it's a good organization. They're for the people that are paying the dollar only they don't get the dollar from them.

Q What's the main purpose of R-CALF as it relates to the promotion of beef?

A Well, R-CALF has been very high visibility in trying to get the imports stopped in the United States. And all the unfairness in the import industry to compete against our cattle here in America.

Q Are those political views that you hold very strong?

A Yes, I do.

Q Johnnie, are you generally aware of the generic promotion in advertising that's been paid for with the checkoff dollars?

A Yes, I am.

Q You're aware of the, "Beef, it's what's for dinner," type campaign?

[113]

A Yes, sir.

* * * * *

Q Do those generally look like the type of promotion and advertising you've seen put out with the checkoff dollars?

A Yes, they do.

Q Do you have any objection to those messages?

A Yes.

Q Would you explain what those are.

A Well, we import about 20 percent of our livestock, our cattle in the United States. It's increased every year and now it's up to about 20 percent. This is promoting foreign cattle. This is promoting foreign beef, whatever you want to call it. Once it steps across the border it is actually USDA beef, whether it be across the Canadian border, Mexican border if it comes in and goes some place. And I think our cattle market is taking it in the chins because of this [114] imported beef that we keep advertising for.

Q Explain how you believe the promotion of beef generically increases the foreign imports.

A Well, when they bring their cheap beef in and blend it, it lowers the price here in America. And a lot of my friends have been put out of business because of the devastating cattle market we've had. And at the same time they keep increasing the imports so we don't have a price, discovery method in the fat cattle industry and eliminates our beef suppliers.

Q And is it your belief that the generic promotion of beef directly hurts your business?

A Oh, certainly. Certainly. The generic promotion of beef is promoting the imported beef. If we don't have the imported beef then the people that are feeding the cattle will come and buy our stock cattle and the producers' feeder cattle to try to make them better and get a decent living out of them.

Q Why do you want to promote U.S. beef rather than just beef generically?

A I tell you what, our beef is so much better than this crap that we haul in from all over the world.

Our beef raised here in America is corn feed, it's young —young good quality cattle that are fed well, they don't have a bunch of BPT or anything like that that's been [115] sprayed on or anything like that. God only knows what all they've had down in Argentina, Brazil, Mexico, or whatever.

And at the same time most of these cattle that do come in, the carcasses that do come in to America, are old cattle. They're aged cattle, they've been fatten and running on grass and they're three, four, five years old and they're a lot stringier and tougher and everything else. Our beef is so much superior that you can't imagine.

Q Do you object to being charged with your checkoff dollars to pay for messages that promote generic beef?

A Absolutely.

Q Have foreign imports been increasing or decreasing?

A They've been increasing.

Q Do you know how much?

A I believe this last year I think out of Canada they were up over 30 percent more. And out of Mexico they were, like, about seven or eight percent more. I'm not sure of my figures. But it was in that vicinity the last time I checked.

Q Do Americans know whether the beef that they're buying in their supermarkets is American or imported foreign beef?

A No. It has the USDA stamp on it automatically. Like I said, when it comes across the border it's automatically USDA and you have no idea there.

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[116]

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Q Do you have any objections or feelings about being associated with the NCBA and its political position through your checkoff dollars?

A Yes, I do.

Q What are those?

A Well, they've done—they've done a lot of things that I felt were against the producers of America. Our individual producers. Such as we had quite a time with them getting a price reporting thing through. Then after we did get it through they trashed it. Then we got labeling. We haven't been able to get the labeling. What's wrong with labeling our products? Ard they were never there to help us get labeling, but all of a sudden now it looks like it's going to go through so now they're starting to get on the bandwagon. And many things like that.

Q Now, you understand the checkoff is co-funded by foreign beef importers and U.S. cattle producers?

[117]

A Yes.

Q Do you have any objection to being forced to associate with foreign beef importers?

A Not if they label it. If they label theirs as being from Ethiopia or wherever, that's fine. There's 36 different countries hauling in here. Let's label it from where it is.

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Q You were a member of the NCBA?

A Yes.

Q And did you attend their functions and visit their headquarters?

A I did down in Denver, yes.

Q Do you have a general familiarity with how the NCBA has operated?

A Yes, I have a pretty good idea.

Q Do you have a general familiarity with the Federation or Checkoff Division and the Policy Division and how those interact?

A More or less, yes.

[118]

Q What's your reaction to a description that you've heard today in testimony that there's a strict fire wall between these divisions at the NCBA?

A When I was at the NCBA headquarters in Denver here, I think, about a year or so ago it was mass confusion. You know, they talk about this fire wall. It's a joke.

Q Now, when a dollar is taken from the sale of a cow on the checkoff where does that dollar go?

A It goes to your Beef Council. Goes to your auction market to start with. In South Dakota we have

about 92 or 4 percent in collecting it. And it goes to the South Dakota Beef Council.

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Q Do you have an understanding of how the checkoff dollar is processed through the system through the State Beef Council and the CBB?

A Yes, I do.

Q Are you, in fact, a member of South Dakota's Beef Council?

A I'm a member of the South Dakota Beef Industry Council.

Q Are you familiar with how the checkoff dollars are [119] handled through that entity?

A Pretty well.

Q Could you explain what happens when a dollar goes to the State Beef Council?

A Well, when we get the dollar at the State Beef Council the first 50 cents automatically goes to Cattlemen's Beef Board. The other 50 cents is kept at the South Dakota Beef Industry Council and the expenses for the Beef Council are taken out of it. They amount to about 25 cents of that 50 cents that's left. Someplace between 25 and 30 cents.

Q What—I'm sorry.

A Then the rest of it in South Dakota we send to the National Cattlemen's Beef Board—Beef Association, I should say.

Q I want to understand what you're saying. Of the checkoff dollar, 50 cents is sent to the Cattlemen's Beef Board?

A Right.

Q Fifty cents is retained by the State Qualified Beef Council?

A Yes.

Q And then South Dakota's Beef Council turns around and sends half of that directly to the National Cattlemen's Beef Association?

A Approximately half of it, yes. It goes to the NCBA.

[120]

Q So 25 percent of the checkoff dollar goes directly to the NCBA?

A Roughly. Yeah, roughly that amount.

Q Is it your experience that—what's your experience as far as how the NCBA will award extra seats on its Board of Directors?

A It's by the number, by the amount of money that's sent in from the Beef Council. I forget what the dollars are, but we recently just sent enough money in, had more money than before, so we got an extra seat. And you can buy your way on the Board of Governors.

Q So the more checkoff money that the State Beef Council remits directly to the NCBA that will determine whether or not they get extra NCBA Board of Director seats?

A Right.

Q That's your personal experience as a member of the South Dakota Beef Council?

A Right.

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CROSS-EXAMINATION

BY MR. LEV:

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[121]

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A They always say the CBB contracts with the NCBA for all this stuff. Yet, here, we send our first 50 cents to the CBB and then when we have our second 50 cents there that it is supposed to be to the state, we take about 25 cents out of it for our expenses, the other 25 cents is sent to the [122] NCBA. And I've asked them a lot of times when they tell me it all goes to the CBB how come we keep sending the other 25 cents to the NCBA and nobody has given me a clear answer yet.

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[123]

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A No. I said we're paying the checkoff and they're [124] advertising beef as beef instead of American beef. We're paying—we're being taxed for paying for foreign beef here in America which is taking away our market for the American cattlemen.

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[125]

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Q Mr. Smith, have you ever complained to the Beef Board about the fact that its ads promote beef without

distinction as to whether it's American or imported beef?

A I've complained to the Beef Board quite a few times.

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[127]

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A Our producers were being eliminated, and we weren't getting any support from the NCBA, and along comes R-CALF and for the people that were looking out for the individual producers, why, NCBA was siding with the packers, the big feedlots, and the retailers. The people who were paying the dollar were being left out of the whole thing.

Q And, so, you joined R-CALF because as a cattle producer you thought that was an organization that was going to represent your interests and your rights, is that right?

A I joined R-CALF because they were going to Congress and trying, and the Federal Trade Commission, trying to improve the dumping and things like that that were hurting our industry.

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CROSS-EXAMINATION

BY MR. BREWERS:

[138]

A What I mean by U.S.A. product is born—bred, born, raised, and fed here in America.

Q And anything that does not meet all of those criteria—

A It's hauled in from Mexico or Canada and fed here, then [139] it's imported beef.

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[141]

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Q USDA controls the message contained in CBB promotional campaigns?

A They have the last say on all of them, you mean?

Q Yes.

A That's what they say, yes.

Q And you would agree with that?

A I don't have to agree with it, no.

Q Well, I'm asking, do you agree with it?

A Do I agree that the USDA should have the last say? No.

[142]

Q Do you agree that they do, in fact?

A They do, in fact.

Q Yes.

A They do, in fact.

Q And you agree with that?

A I think they do. That's what they tell us at the Beef Council. You come up with a program or something like this and they'll say, well, it probably won't fly. You say, why won't it fly? And they say, because it might at headquarters, but USDA will not go for it, so.

Q So—

A So they have the last say.

Q And just to expound upon that for just a moment. Those type of comments come when a project is proposed but it is believed that the USDA will not allow that type of message to be conveyed using checkoff funds, correct?

A Yes.

Q And you've witnessed those type of conversations yourself?

A Yes.

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[Testimony of Herman Schumacher – Excerpts]

[144]

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HERMAN SCHUMACHER, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Herman, would you introduce yourself to the Court.

A I'm Herman Schumacher from Herreid, South Dakota.

Q And are you a cattle producer?

A Yes, I am.

* * * * *

Q Are you, Mr. Schumacher, generally aware of the generic promotion and advertising that is paid for with beef checkoff dollars?

A Yes, I am.

Q And you pay the beef checkoff personally?

A Yes, I do.

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[145]

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Q Are those representative of the types of promotion and advertising that you've seen being put out with the checkoff dollars?

A Yes.

Q Do you have any objections to those messages contained in those?

A Yes, I do.

Q Why don't you explain what those are.

A Well, to me, the American producer is seeing 20 percent of the beef consumed in the United States being—coming outside of our borders, beef and cattle, that is. And I'm seeing where the American producer is paying for a generic promotion and enhancing the price of foreign beef that comes in here and is in direct competition to his. That's lowering the market for the American cattleman.

Q What type of message would you like to send with the checkoff advertising promotion?

A U.S.A. beef. Beef U.S.A.

Q Do you object to being charged for a contrary message by the checkoff?

A Yes, I do.

Q Do you believe U.S. beef is superior to foreign imported beef?

A Why, yes. You know, we go through a lot of the—first [146] of all, I think not alone superior, but I think our safety standards are better. We're importing beef now from as many as 30 some different countries. And I know there's a lot of countries that have very good safety standards, but there are some in question. And our beef is corn—I mean, is grain fed. It is by far a superior product. And I've traveled this country from border to border and been in a few foreign countries also and American beef is the beef of choice.

Q What's happening to foreign beef imports?

A Foreign beef imports have come up, and I'm just going to—you know, I'm just going to—I've got the information. But since 9-11, September 11th, our imports in October were up 26 percent from Canada alone, 11 percent from Mexico—or, eight percent from Mexico, I believe. Overall our imports from Canada this past year are up 12 percent.

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A Okay. And Mexican imports are up three percent.

Q Do you generally keep track of how much beef is being imported as part of your business?

[147]

A Yes. You know, we've—if I may, I've been in the business now that I'm in for 21 years. And I got started

in 1981. And I just look at what the producer's share of the consumer dollar is and it was at almost 70 percent, today it's down to some 40 percent. So, there is a problem.

Q Do you believe that generic beef advertising of the type we've just talked about paid for with the checkoff, do you believe that that contributes to increased importation of foreign beef?

A Why absolutely. I mean, one thing, I don't know if we touched on it at all today, but look at the difference in the valuation of the dollar. It's a heck of a deal for the Canadians as well as the Mexicans to import to the United States just for the valuation of the dollar.

Q And do the increased foreign imports hurt your business?

A Yes, they do.

Q Explain how.

A Well, again, they go in direct competition with—I mean, our—the beef business and the cattle business is a very supply oriented, I mean, sensitive—supply sensitive business. And I'm saying that in the last 14 years, again going back to the producer's share of the retail dollar, which we've seen it shrink away, and any time that there's more cattle, more beef brought into the United States it's in direct competition with my—with my customers.

[148]

Q Do Americans know where the beef that they purchase in American comes from?

A No, they don't.

Q Why not?

A I just returned from a trip to Washington, D.C., four weeks ago and we went to one of their great—one of the largest grocery stores in Washington, D.C., and had the privilege of talking to the meat manager. She didn't know it. And they sell a lot of beef.

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Q Do you think the generic promotion of beef contributes to the misconception the Americans may have about where their meat is coming from?

A Why, yes. In the store that we were in, in D.C., one of the largest stores in D.C., all of the beef there, and there was four different kinds of, for example, hamburger. And, you know, it went from a 78 percent lean to a 94 percent lean. And there's a very good chance that in the 78 percent lean there would have probably been blended product from all [149] across —all outside our borders, all across the world.

Q Do you have any objection to being associated with the NCBA through your checkoff dollar?

A Yes, I do.

Q What are those objections?

A Well, first of all, you know, I'm forced to be a member of the NCBA because I'm forced to pay my dollar checkoff which eventually a good share of it ends up in the hands of NCBA.

Q What's your objection to that?

A Well, in my mind the National Cattlemen's Beef Association has lost all touch with the grassroots producer out there. And it's evident, everything that we've tried to promote—I belong to another organi-

zation—that we try to promote to try to help the industry, the grassroots producer, the U.S. producer, we've had a heck of a battle with NCBA. And largely coming right out of Washington, D.C., and the halls of our Congress.

Q Do you disagree with some of the political positions being promoted by the NCBA?

A Yes, I do.

Q Just explain briefly.

A Well, country-of-origin labeling, for instance. I know they have their version of it, but it's a long ways from the one that R-CALF proposes.

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[Testimony of Jerry Goebel - Excerpts]

[156]

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JERRY GOEBEL, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Would you introduce yourself to the Court.

A I'm Jerry Goebel from Lebanon, South Dakota.

[157]

Q And are you a cattle producer?

A Yes.

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Q Are you a member of LMA?

A No.

Q Are you a member of NCBA?

A No. Not any more.

Q Have you ever been a member of the NCBA?

A Yes, we was.

Q What happened?

A Oh, about five, six years ago it just—nothing was [158] going the way we thought it should, so we quit sending in our dues.

Q Mr. Goebel, are you generally aware of the type of promotion and advertising that's been placed out into the media by the beef checkoff?

A Yeah.

Q Have you had an opportunity to review what's in front of you, which is Exhibit A to the Joint Stipulation, and Exhibits 26A through L and Exhibit 27?

A Yeah, I've seen them.

Q Are those reflective of the type of generic beef promotion and advertising that you've seen put out through the checkoff?

A Yes.

Q Do you have any objections to the messages that are being sent out?

A Yes, I do.

Q What are those objections?

A It's just beef. There's no U.S. beef or—and I don't like to see the other countries in there with us, with our beef.

Q What type of message would you like to send instead of these generic beef messages?

A U.S.A. beef would be great.

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[159]

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Q Does that Declaration accurately reflect your views and your objections to the messages of the beef checkoff advertising?

A Yes.

Q Do you think that these type of generic type of beef messages work to increase foreign imported beef?

A Yes, they seem to. The ex—or, imports just keep going up all the time.

Q Is it your belief that increased foreign imports hurt your business?

A Yes, I do.

Q Do you have any objection to being associated to the NCBA through your checkoff dollars?

A I don't like it.

Q What are your objections?

A Well, that's the main deal, they're not doing what they're—they should be for us and they're—90 percent of the time they're against the ranchers.

Q Do you have political differences with the policies promoted by the NCBA?

A What do you mean by political?

Q Are the[re] positions they take on issues that you disagree with?

A Yes.

[160]

Q What are some of those?

A Well, just—I'm trying to think of them right now. It would be where they—

Q In other words, some of the reasons that made you resign from the NCBA?

A Yeah, it's—well, when they had their meeting there that one time you couldn't get on the—it was down—I don't remember where it was, but it was a long ways away. It was just impossible to go.

Q Is country-of-origin labeling, is that an issue you might have disagreements?

A Yeah. That was one of them, yeah.

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[Testimony of Robert Thullner – Excerpts]

[165]

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ROBERT THULLNER, PLAINTIFFS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. PARSONS:

Q Boy, would you introduce yourself to the Court.

A I'm Robert Thullner from Herreid, South Dakota.

Q Are you a cattle producer?

A Yes, I am.

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[166]

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Q Do you pay the beef checkoff every year?

A Yes, I do.

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Q Are you a member of NCBA?

A No.

Q Are you generally aware of the generic promotion and advertising materials that are put out by the CBB with the beef checkoff dollars?

A Yes.

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[167]

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Q Do you have any objections to those?

A Yes.

Q Why don't you explain what those are.

A I guess as an American farm producer, cattle producer, I object to having my American produced meat and cattle commingled with foreign products.

Q You object to the generic advertising?

A Yes.

Q What would you like to see instead?

A I'd like to see a campaign out there promoting American beef that's produced here.

Q Do you object to being charged for these messages that are contrary to that?

A Absolutely.

Q Have you done a Declaration in this case?

A Yes.

Q Does that accurately reflect your objections to these types of promotional messages?

A Yes, it does.

Q Do you think that these type of generic advertising beef, that type of message increases foreign imports?

A Yes.

Q Why don't you explain why you believe that.

A Because it's promoting meat at the expense of what I [168] produce, it's commingled, and I receive less money for the product that comes off my South Dakota American produced farm.

Q Do you think, then, that the generic promotion that you subsidize actually hurts your business?

A Absolutely.

Q Do you think U.S. beef is superior to foreign beef?

A Yes.

Q Why is that?

A Because I can see how the American farmer raises and produces his livestock, how he cares for it. Health requirements and such.

Q As a cattle producer do you follow the trend of imports?

A Yes.

Q What's been happening to imports?

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A The first part of this year, just using Canada as an example, live imports through August were up 33 percent. Beef imports out of Canada through November were up six percent.

BY MR. PARSONS:

Q Do you attribute that, in part, to the generic promotion of beef rather than the promotion of American beef?

A Absolutely.

[169]

Q Do you have any objections to being associated with the NCBA through your checkoff dollars?

A Yes.

Q What are those?

A Country-of-origin labeling. They don't want to follow the true program. I believe foreign bred, fed, slaughtered in the U.S.

Q. Is it fair to say you have political differences with the NCBA?

A Yes.

Q Do you object to being associated with them through the checkoff?

A Yes.

Q How do you feel about being associated with importers of foreign beef through co-funding the checkoff with them?

A Not very good.

Q Explain why.

A Well, they bring their product into the United States and commingle with mine and my fellow neighbors, it drives down the price creating less market for what we as American farmers are producing.

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CROSS-EXAMINATION

BY MR. LEV:

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[170]

Q Are you a member of R-CALF?

A Yes.

Q And why are you a member of R-CALF?

A I'm a member of R-CALF because I feel they're an organization that's trying to increase my bottom line through American produced livestock.

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[172]

CROSS-EXAMINATION

BY MR. BREWERS:

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[173]

[Q] Do you believe that the checkoff, in the current form, returns any value to you?

A No.

Q No. None at all? Please answer out loud, sir.

A No.

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[175]

A I think what I'm trying to say is that we have meat coming in from 36, 37 different countries, brought into the United States and mixed with American produced meat and sold as a generic product.

Q Isn't that going to happen no matter what happens with the checkoff?

A I don't think so.

Q Can you explain?

A I think that if we have a label that says American produced meat that the consumer would sooner buy that than a foreign meat not knowing where it comes from or what it really was.

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[Volume 2]

[Testimony of Monte Reese – Excerpts]

[187]

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MONTE REESE, DEFENDANTS' WITNESS, SWORN.

[188]

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DIRECT EXAMINATION

BY MS. McKEE:

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[Q] Who is the final decision maker on how checkoff funds are spent?

A The U.S. Department of Agriculture must approve all of our programs and projects.

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[Q] First of all, tell me, are there any limitations on what the Beef Board or beef producer can do with checkoff funds?

A Absolutely.

Q What are those limitations?

A Well, there are several.

The Act and the Order stipulate that no checkoff funds can be used for lobbying, for the purpose of influencing government action. They stipulate that we may not make disparaging comments about another commodity. We cannot with Beef Board funds promote or conduct research with the primary objective of promoting live cattle sales or conducting research on live cattle production practices.

It's a Beef Promotion and Research Act and Order.

Q Surely live animal research is something that cattle producers really care about.

A Certainly.

Q And, yet, you can't state—producers cannot fund that through the checkoff?

A That's correct. Producers—some producers have indicated to me they'd like to fund certain projects. But the authorization in the Act and Order and what USDA will allow us to do must be consistent with that. And

the only time live animals are involved in research is if it's a [198] project clearly and directly related to the consumer's acceptability of beef as an end product.

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[Q] Who is the final decision maker, again, on whether a project that is developed with checkoff funds is in—or, appropriately under the Act or not?

A Final authority is USDA.

Q Now I would like you to walk me through this approval process, this developmental and approval process for a checkoff funded project.

Let's take, for example, the BSE problem, the mad cow—for us nonproducers, it's the mad cow issue. Is that something that could be funded under the Act?

A Yes, it is. We've conducted industry information, consumer information programs trying to counter the sensationalizing effects of the those in the media who choose to use this mad cow disease pointing out—as the name for BSE—pointing out the fact that it's never occurred in the United States.

We've also conducted a considerable amount of research on this and other beef safety issues. We've been urged to do that sort of research and work closely with USDA to design information programs.

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Q What happens next once the Executive Committee has ratified that proposal?

A Then the proposal is submitted to USDA for final approval. And it is only upon approval of the USDA that the work can begin and the costs be reimbursed.

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[203]

Q What happens if the United States Department of Agriculture does not approve the project?

A If USDA didn't approve the project we couldn't spend the money.

Q Assuming that they did, in the BSE research matter, that they did approve the project, how does it get implemented?

A We then, we being the Beef Board, the Operating Committee, enter into a contract with the qualified industry organization to carry out the work of that project.

That contract is also submitted to USDA for approval and it stipulates that we will only reimburse actual and necessary costs and even only certain costs involved with the project itself.

Q Once that contract has been entered into does the work then begin?

A Yes. Assuming USDA has approved the contract. We wouldn't enter into it until USDA had approved both the project and the contract.

Q What if in that project, in that BSE research project, some kind of communication or advertising supplemental project comes out of that, what happens to those, to that advertisement?

A The advertising message would also be submitted to USDA for approval.

[204]

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Q What kind of oversight is there of the Qualified State Beef Council projects?

A It's the same type of oversight as a Beef Board project [205] in that the guidelines for what they can do are established by the Act and Order. Oversight is rendered by both the Beef Board and USDA.

At the beginning of each fiscal year we require * * * each State Beef Council to submit a copy of its marketing plan indicating how they will use checkoff dollars during that year. At the end of the fiscal year we require them to submit an audited financial statement audited by an independent certified public accounting firm that represents how they did, in fact, use those dollars, and we ask those audit firms to make a representation to us as to whether or not in their work anything came to their attention that caused them to believe those functions were outside the parameters established by USDA through the Act and Order.

The Beef Board also conducts what we call financial and procedural reviews of each State Beef Council to look at their expenditures and make sure they are in accordance with the guidelines established.

Q Does USDA see those audits and those financial reports that the Beef Board generates?

A Yes, they do. We submit each of the financial and procedural reviews to USDA.

In addition to that, USDA attends every meeting of the Beef Board Executive Committee where the reviews, the [206] audits, even marketing plans are discussed.

Q What about the project that the Qualified State Beef Councils generate, does USDA or the Beef Board review any of those?

A Yes, we do. For example, if—for the most part the State Beef Councils will simply conduct the same kind of advertising campaign that's conducted at the national level. The Act and Order stipulate that we should have a coordinated state and national program. So, when the creative message is developed it's intended for use at both the state and national level.

If, however, a state, for example, would want to make reference in one of its own ads to the brand or trade name of any beef product, that would have to be approved by both the Beef Board and USDA.

Q And that approval on brand named projects is before the fact, is that right?

A Yes, it is.

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[Q] Mr. Reese, you've spoken today about the role that the United States Department of Agriculture plays in the checkoff process. The Department is a large agency and can really only work through its people.

Who do you work with at the United States Department of Agriculture?

A Primarily Barry Carpenter. And until recently, Ralph Tapp, who works with Barry.

Q What sort of working relationship do you have with Mr. [215] Carpenter and with Mr. Tapp?

A It's a very professional working relationship. They attend every meeting of the full Beef Board, every Operating Committee meeting, every Executive Committee meeting. In the time I've been employed at the Beef Board I can think of none of those meetings but what both, either one or the other, or both Barry Carpenter and Ralph Tapp were in attendance.

Q Do you ever talk to them or see them in between those meetings?

A Sure. We talk via telephone whenever the need arises, whenever there's an issue that I need guidance from them or they choose to provide guidance to me. And we may talk on some occasions several times a day, and it may be a while in between times.

Q How would you then characterize your overall relationship with USDA?

A USDA overseas this program. They have the final authority. We often seek their guidance as projects are being developed for submission to the Operating Committee and certainly seek their approval after the project is approved.

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Q Finally, Mr. Reese, you had said before and the Beef Board said on occasion that the checkoff program is a producer led program. And, yet, you've testified today about all of the oversight that the United States Department of Agriculture has that program.

Is it really fair to say that this is a producer run program?

A Yes, I believe it is.

Q Why?

A Notwithstanding the fact that it is a government established program and the restrictions on what can be done with checkoff dollars are established by the government and USDA has the final approval authority, if you look at the process by which projects surface, ideas surface, and proposals are developed and submitted to USDA for approval, at every level there are producer leaders involved. It's [223] leaders that wind up serving on State Beef Council board of directors, serving on the Beef Board, serving on advisory committees, serving on the Operating Committee, serving on the Beef Board Executive Committee. Each of those producers are leaders of their industry. And there isn't an expenditure of checkoff dollars that I know of but what it had its genesis in the idea a producer had. That's why I think it's a producer led government supervised program.

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CROSS-EXAMINATION

BY MR. PARSONS:

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Q Did you say anything to the effect that live cattle producers aren't eligible to have programs because the programs must center around beef, the end product?

A No, I did not say that. What I did say is that we don't fund programs that promote live cattle sales. We fund programs that promote demands for beef.

I can think of no reason why there would be value in live cattle were it not for beef demand.

Does that clarify the issue?

Q It does.

Can you understand why cattle, live cattle producers would object to paying into a checkoff where their products cannot be promoted?

[225]

A Their product is beef. And it is being promoted.

Q Do we disagree that a live producer's product is live cattle?

A The value attached to that product comes from demand for beef. Now—and maybe I'm not understanding your question.

Q Who sells—I understand the cattle producers sell live cattle. You understand that?

A Yes.

Q Who sells beef?

A A number of entities throughout the beef industry.

Q Packers, processors?

A And others.

Q Distributors?

A Retailers, restaurateurs. The list is lengthy.

Q Do any of those entities pay into the checkoff?

A If they own cattle or import beef, yes.

* * * * *

Q And I think you testified that it was your job to enforce that wall, is that true?

A I think what I testified it was my job to make sure no checkoff dollars were spent inappropriately.

[226]

When it comes to enforcement, I think that role is vested in USDA.

Q Ms. McKee asked you how do we know whether or not there—whether they actually are separate, these divisions in the NCBA, and wasn't your response, ma'am, that's my job?

A That was part of my response.

Q And you're CEO of the Cattlemen's Beef Board?

A That's correct.

Q Why is it the CEO of the Cattlemen's Beef Board's responsibility to enforce a fire wall between the fire wall—between the divisions of the NCBA which is a private beef organization?

A Again, you use the word "enforce." And I'm uncomfortable with that word because I have no enforcement authority.

Q But that's your job?

A I do, as the chief operating officer of the Beef Board, have the responsibility for making sure that our contracts are implemented in accordance with the contract, itself, and with the rules and regulations under which we operate.

Those regulations stipulate cost recovery. Those contracts stipulate cost recovery. It's my job to ensure that we don't compensate any contracting organization, it's part of my job, for more than cost recovery.

Q Do you have to put out a lot of fires along that fire [227] wall?

A If we discover an issue we don't pay the bill.

* * * * *

Q Is that a Cattlemen's Beef Board article?

A The article is about the Cattlemen's Beef Board. But it is not a Cattlemen's Beef Board publication.

Q Who is Sharl Phipps?

A Sharl Phipps is an employee of the National Cattlemen's Beef Association.

Q We see the beef checkoff symbol here.

Is the beef checkoff symbol placed on documents that are put out by the Cattlemen's Beef Board?

A It is used to indicate the checkoff program. The Cattlemen's Beef Board has registered that logo. It's intended to indicate the beef checkoff.

Q So that's the registered logo of the CBB?

[228]

* * * * *

Q Now, we've talked a little bit about this.

But from the original dollar that a producer or importer pays on the checkoff, an importer will pay his full dollar directly to the CBB, is that true?

A That's correct.

Q But a cattle producer, if they are in a Qualified State Beef Council, and it looks like that's 45 of the 50 states.

A Right.

Q They will pay 50 percent of their dollar to the CBB and the other 50 cents stays in the state, is that true?

A Yes.

Q Then the states can pay whatever administrative and promotional expenses they want and they can then remit some of that money directly back to the Federation Division of [229] the NCBA, is that true?

A That's close. They can fund programs in their state as long as those programs are consistent with those authorized by the federal government. And then they may make the decision whether to send money over to the—to supplement the national program.

Q Did you here Mr. Smith's testimony yesterday of his experience with the South Dakota Beef Council?

A I heard his testimony.

Q And he testified that their council was cutting basically 25 percent of the money, they were cutting a check directly to the NCBA. Is that consistent with the process?

A If that's their decision, yes.

Q And the NCBA is a private—

A When you say consistent, that decision is made by each State Beef Council. In total the revenue is about 12 million of that 36 million from the State Beef Councils that goes to some national program.

Q And the NCBA is a private organization?

A The Federation of State Beef Councils is the entity receiving those funds and that's a division of NCBA.

Q Right. So when anyone says the Federation, they're really talking about a division of the NCBA?

A That's correct.

Q Now, the beef promotion and Operating Committee, that's [230] the committee that makes the decision as to what projects get funded and what messages get sent out, is that correct?

A They make the decision on what proposals they wish to fund. The USDA makes the final decision on whether or not they are funded.

Q The USDA has the final approve, yea or nay?

A That's correct.

Q But the decision as to what projects will be funded and sent up for a yea or nay are made by the beef Operating Committee?

A That's correct.

Q And of that—

A Subject to approval by the Beef Board Executive Committee, yes.

Q And of that committee, 10 members are appointed directly from the CBB?

A They're not appointed. They're elected from and by the Beef Board.

Q Thank you.

And those members will be CBB members so they will have been appointed by the Secretary of Agriculture?

A That's correct.

* * * * *

[231]

* * * * *

Q The Beef Operating Committee has 20 members?

A Yes.

Q And they make the decisions regarding funding?

A Yes.

Q Ten are from the CBB, elected?

[232]

A Yes.

Q And 10 are elected from, says here, 45 Qualified State Beef Councils. Is that true?

A Um-hum.

Q Now, what this means is the Federation Division of the NCBA, is that true?

A The election process is managed by the Federation Division. But the members of the Operating Committee from the State Beef Councils do not have to be members of the Federation or even on the Board of the Federations. The law says they have to be a member or an ex officio member of a Qualified State Beef Council[.]

Q But they're elected by the NCBA's Federation Division?

A They're elected by the Qualified State Beef Councils who choose to join that Federation.

* * * * *

[233]

* * * * *

Q And these 10 members are not appointed by the Secretary of Agriculture?

A No. They're elected by the Qualified State Beef Councils. However, they're election is certified by the U.S. Department of Agriculture.

Q Now, I want to look down further and we talk about the contracting organizations. And I want to read, if you would read, the first sentence under that block. Do you see where I'm talking? Where I'm talking about?

A You want me to read that first sentence?

Q If you would.

A "By law, the Operating Committee serves as an independent body, reviewing and approving checkoff programs and contracting with national industry-governed organizations."

Q Now, is that a true statement?

[234]

A I believe it is.

Q By law, the Beef Operating Committee, that's what it's referring to?

A Yes, the Beef Promotion and Research Act and Order established the Operating Committee.

Q By—

A And charged it with responsibility of developing plans and programs for submission to the USDA for approval.

Q By law, the Operating Committee serves as an independent body. You just said that was a true statement. So the Operating Committee is an independent body, right?

A Independent from? Yeah, unlike what you've attempted to characterize it, it's independent from NCBA.

Q And independent from the government?

A No, I don't believe it says that. It says, by law, it's established with certain responsibilities.

Q And then, by law, it is an independent committee.

Also says that they review and approve the checkoff programs. That's their function?

A Subject to USDA approval.

THE COURT: Mr. Reese, I'm still somewhat confused here.

Looking at this chart, it says 45 Qualified State Beef Councils Act to elect 10 producers who then sit on the Operating Committee, is that correct?

[235]

A That is correct, Your Honor.

THE COURT: How does that work, then, the 45 Qualified State Beef Councils all have a meeting and then elect 10 people?

A The 45 State Beef Councils are asked first to submit names for a Nominating Committee. They are asked to submit candidates for the Operating Committee. The Nominating Committee interviews those candidates, recommends a slate, and the State Beef Council delegates to the Federation then elect those 10 producers. They are not required to be members of the Federation. They're required to be members of a Board of directors of a State Beef Council.

THE COURT: But the State Beef Council, of course, must be a member of the Federation?

A Not necessarily, Your Honor.

THE COURT: The Qualified State Beef Council is not required to be a member of the Federation?

A There are 45 Qualified State Beef Councils.

THE COURT: Yes.

A There are only, and I don't know the number, but some of the smaller ones do not chose to join the Federation. They would still be eligible to submit a candidate for the Operating Committee.

THE COURT: Looks like a very cumbersome operation.

A I certainly agree, Your Honor. But it's the one [236] established by the federal law.

* * * * *

Q Another point I wanted to make, these CBB members who go on to the Beef Operating Committee, they're also NCBA members, aren't they?

A Why would they be?

Q Well, you're a NCBA member?

A I am.

Q Aren't all CBB members NCBA members?

A I doubt it.

Q Most?

A I have no way of knowing that. But I doubt it. Because let's go back to those organizations certified by the USDA to nominate. Many of those are State Farmers Union groups, State Farm Bureau groups, State Dairy groups who might have no reason to join NCBA on the policy side. So, I'm confident not all of them would be NCBA members, but I don't have the number.

[237]

Q Why is the government not listed anywhere on this organizational chart?

A I didn't develop the organizational chart, so I'm probably not the one to ask the question.

Q So I guess you wouldn't know why this chart that appears in the NCBA's publication with the CBB's checkoff label looks so different from the one you've drawn out today?

A I don't think it is very different at all.

Q Okay.

A It is not as complete as the one drawn. But it is accurate.

* * * * *

[240]

Q Do you recall testifying a couple of years ago that the CBB only had three employees?

A At one time we did only have three employees.

Q 1999?

A I don't remember the date. At one time we had only three employees. We've increased the staff size since then.

Q Now you have eight employees and a budget of how much?

A The total Beef Board projected revenue?

Q Yes.

A Is 45 million for the current fiscal year.

Q How do eight employees manage a budget of that magnitude?

A I'd like to think very well.

We are required by law to contract to carry out specific programs with existing national not for profit industry-governed organizations. So we do, in fact, contract for program work. Those eight and a half employees carry out the administrative responsibilities of the Beef Board, which includes the oversight of those contracts.

Q And these are these joint staffing agreements?

A We have no joint staffing agreements, as I understand it. Could you be more specific?

Q Joint staffing agreements with the NCBA. You have no such?

A We have an administrative service agreement. I don't— [241] I don't know of any joint staff. I seem to recall that this came up during the deposition and I indicated there was no joint staff.

Q Now, are you staffed by the NCBA. Do you contract out for the NCBA to perform staff functions?

A To conduct programs, yes.

Q Okay. Not joint staff. Purely NCBA staff. Is that true?

A Is what true?

Q That your staffing is done through contracts, much of it with the NCBA?

A The program staffing, yes.

Q Now, in paragraph 9 of Exhibit 207, the testimony was that based on proposals and ideas collected at these meetings, Federation Division employees, that's NCBA employees?

A Yes.

Q Prepare specific national project proposals, with accompanying budgets, in the form of AR's for submission to the Beef Operating Committee, is that true?

A I believe it is.

Q So the Federation Division of the NCBA prepares and submits the project?

A Some of them, yes. The ones covered by this document.

Q And, then, the entity that's submitted to is the Beef [242] Operating Committee?

A Yes.

Q And that's 50 percent made up of Federation Division electees, true?

A Well, you are introducing a term that I haven't used.

They must be members of a board of directors of a Qualified State Beef Council.

Q And, then, actually the staffing of that Committee is performed by the NCBA's Federation Division?

A Of the Operating Committee?

Q Yes.

A No I am the administrative manager of the Operating Committee.

Q Okay. And, then, once the Beef Operating Committee approves a project that is then implemented, according to paragraph 10, by the Federation Division of the NCBA?

A After USDA approves it. We enter into a contract that's approved by USDA, that's correct.

Q And approximately 90 to 95 percent of the project contracts are awarded to NCBA?

A I don't know that that figure is correct. I want to see the numbers and perform the calculation. I would agree that NCBA Federation Division is our largest contractor. I'm not certain of the percentage.

Q If you testified about 90 percent in an earlier case, [243] would that be consistent with your recollection?

A I don't recall testifying to that. But if I had the information available to me, I could tell you exactly what it was.

Q So just to be clear, though, then the Federation Division prepares and submits the proposal?

A Its proposals, yes.

Q They send them to the committee where the Federation Division has 10 members—or the Qualified State Beef Councils do?

A Where the Qualified State Beef Councils have 10 members and the Beef Board have 10 members.

Q And then they award a large majority, perhaps 90 percent of those contracts, right back to the NCBA. Is that a fair statement?

A They also turn down a number of them.

Q Okay. With such a strong role for the Federation Division of the NCBA, which is a private trade organization, does that sound to you like this is government speech?

A Yes, it does. The Federation is established by the Act and Order.

Q Are you here today, Mr. Reese, to tell the cattle producers of America that the messages paid for by their checkoff dollars are not the voice of cattle producers, but are instead the speech of the United States government?

[244]

A I'm here today to say that the beef checkoff conducts programs producers want that USDA will allow and that the federal government authorizes.

Q And there are no taxpayer funds at all in the CBB?

A No.

Q And, in fact, the CBB is required to reimburse the USDA for any oversight that it does?

A We reimburse USDA for the oversight that it does and bills us for.

Q I'd like to take a look at your first Declaration, which is Exhibit 204. It should be in front of you.

And I'm at paragraph 4. Paragraph 3, excuse me. You state that the board is funded wholly through assessments on the sale and importation of cattle. Is that true?

A Yes.

Q So there's no doubt that the funds are not government funds?

A You're asking me for a legal conclusion.

The assessments are authorized by the Act and Order. So I—the authority for the assessment on the sale and importation of cattle comes from federal law.

Q So this is not money belonging to cattle producers?

A After they've paid the assessments.

Q They [lose] ownership?

[245]

A After they've paid the assessment then either the Qualified State Beef Council or the Cattlemen's Beef Board is responsible for those funds.

* * * * *

Q In paragraph 3 you state that while the Board's domestic promotion programs make no distinction between domestic and imported beef—well, let me just ask you.

That's true, isn't it, that the domestic promotion programs make no distinction between domestic and imported beef?

A That is true.

Q So beef is just promoted as a generic commodity in the United States?

A That's generally true. There have been, as we discussed earlier, some brand or trade name references that I think would go beyond the definition of generic.

Q But overseas U.S. beef can be specifically promoted?

A Yes.

Q Can you understand at all why U.S. [] cattle producers [246] might be upset by that?

A Sure.

Q Why do you think they would?

A We heard testimony yesterday that certain individuals now claim to be upset about that. And I can understand those claims.

Q I want to go to paragraph 8. I'm reading the second to the last sentence. Would you read that, the one that begins, "For example?"

A "For example, no decision of the Beef Board is implemented without first being approved by cattle producers."

Q Is that a true statement?

A I believe it is.

Q So no decision of the Beef Board can be implemented, no message can be sent, or a dollar spent without first being specifically approved by cattle producers, is that true?

A That's not what this statement says. It says that no decision is implemented without first being approved by cattle producers.

Q So, in effect, cattle producers make the decision?

A Subject to USDA approval, yes.

Q And no decision of the Board would be implemented without that approval?

A Again, the statement is no decision of the Beef Board is [247] implemented without first being approved by cattle producers. And then we go on to the next statement that says, "I don't believe this characterization is in any way inconsistent with the extensive oversight USDA provides." That's the USDA approval process.

* * * * *

Q Yes. I read on the second line again that industry contractors formulate proposed checkoff funded projects?

A Yes.

Q Is that true?

A It is.

Q So the proposals are formulated by private beef industry contractors, correct?

A By organizations defined in the Act and Order.

Q Not by—

A That's not for profit national beef industry-governed organizations that were established at the time of the Act and Order.

Q The government doesn't formulate the project?

A Not normally. The government may indicate, as they've done in the case of safety research, the BSE issue that I mentioned earlier, that they would like to see certain [248] projects developed.

* * * * *

Q At this time was Mr. Heinze an employee of the NCBA?

A Yes.

Q Why is the contact person for a Cattlemen's Beef Board press release Lynn Heinze who is a member of the NCBA?

A He wasn't a member—I don't know whether he's a member of NCBA. He was an employee of NCBA contracting to the Beef Board to do producer communications. At that time we had no communications person on staff at the Beef Board. Today we do.

Q I notice that both you and Mr. Heinze have the same [249] e-mail address.

A Well, we have the same—

Q Beef.org.

A —the same information on the back end of it, yes.

Q Why would a person from the CBB have the same e-mail address as a person from the NCBA when there is this fire wall between them?

A There's an information technology resource available that the Beef Board takes advantage of. That e-mail address that shows mresse does not go directly to me, it goes to my administrative assistant. I have a separate e-mail address.

Q You state down at the bottom in the press release that the checkoff is producer controlled. Do you believe that? The second to the last paragraph.

A Yes.

Q We've talked about the last paragraph, that the CBB is an independent 111 member Board. That's true?

A Yes, it's true that it is independent from NCBA or any of its other contracting organizations or any other industry organization.

* * * * *

[250]

MR. PARSONS: Sorry, Your Honor. Plaintiffs' Exhibit 54.

A Yes, this appears to be a submission that the Beef Board made to a USDA Task Force in response to some recommendations concerning all checkoff programs. This occurred a little over a year and a half ago.

Q About a year and a half ago, and it's correspondence from the CBB to the USDA?

A Yes.

Q I want you to turn to the third page which is marked at the bottom CBB 05855.

THE COURT: 05854, Counsel?

MR. PARSONS: 05855. It would be page 4.

THE COURT: That's the fourth page, okay.

BY MR. PARSONS:

Q Do you see where its says "Industry run program?"

A Yes.

Q The sentence above that, would you read that?

A The sentence reads, "However, let there be no mistake about the fact that cattlemen and importers who pay for this program run this program.

Q Is that a true statement?

A Taken in the context of the entire document, it certainly is.

* * * * *

[251]

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Q But this is the CBB telling the USDA, don't you make any mistake about it, it's the cattlemen and the importers who pay for this program and run it, is that true?

A That's what the sentence says.

* * * * *

A "In short, cattlemen and importers run the Cattlemen's Beef Promotion and Research Board."

Q "Policies are established by the Board?"

A "And the Board ensures that these policies are carried out by staff." Do you want me to continue?

Q Why don't I do it. "This is the system that the cattle industry requires to run an efficient and effective operation." Nothing in there about the governments at all, is there?

A Again, let's put this in perspective. This is the Beef Board responding to the government. Wouldn't it be ludicrous for the Beef Board to discuss the fact that there is government oversight? Both the writer [252] and the recipient understand that.

* * * * *

A "'We see USDA's role as protecting the program from mismanagement but not dictating what we do,' said Lyle Gray, chairman of the cattlemen's Beef Promotion and Research Board."

Q Is that a true statement?

A It's a quotation, I'm sure he said that.

Q But the substance, is that something you agree with?

A Again, let's not take it out [of] context. I certainly agree with it. He is acknowledging USDA's role in oversight and part of that role is to protect the program from mismanagement. When he says "not dictate what we do," I think he's acknowledging the fact that it

is a producer led program without obscuring the fact that it is also government controlled.

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[253]

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Q Tells us how the checkoff works. And there is an organizational chart. And this was put out by the CBB?

A Yes.

Q Can you tell me anywhere on this organizational chart where the government is mentioned?

A No, I can't. Again, in context, if you look at the letter from Dan Hammond above that chart, the chairman of the Cattlemen's Beef Board, it establishes that in this report is an account of checkoff investments at the state and national level. The chart shows how those dollars flow. They don't go to the government.

Q Plaintiff's Exhibit 71. Can you tell me what that is?

A This appears to have been pulled from the Beef Board's web site and it appears to be verbiage from a brochure that was developed that has an overall description of various checkoff programs.

Q The first paragraph as to what is a checkoff program states that these programs are similar to businesses funded by shareholders, producers, processors, handlers, importers, with a Board of directors that is accountable to the [254] shareholders. Does that say anything about a role for the government?

A That particular paragraph does not.

Q Would the Board of directors for these shareholders essentially be the Beef Operating Committee?

A Again, this is a characterization how these programs, all programs, not just the beef checkoff, are similar to businesses with a Board of directors. I think what they're saying is that there is a similarity between the Beef Board and a Board of directors and just as a Board of directors is accountable for the successful operation of that entity to the shareholders, so is the Beef Board accountable to both the producers who pay the checkoff and the government who oversees the programs.

Q Just on the next page, then, the question is asked, do checkoff programs receive government assistance? The answer is no. Is that true?

A Yes. It goes on to say they're funded by the respective industries, not by taxpayers or government agencies. But it does acknowledge USDA oversight.

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[255]

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Q What is this document?

A This outlines a planning cycle for the beef industry.

Q Talks about the NCBA and CBA leadership?

A CBB leadership.

Q CBB leadership. Joint Industry Budget Committee. The Operating Committee approval. Where on this planning cycle does it ever mention a [role] for the government?

A That's not the purpose of the document to outline the role of the government. The purpose of the document is to outline what needs to happen for various industry organizations in developing a proposal that would go to the government for approval.

Q Plaintiffs' Exhibit 83. What is this document?

A This appears to be a document that we provide to our Beef Board members to help them understand their responsibilities.

Q And what's sentence number 1, what does that say?

A "The Beef Board operates through the direction of Board members."

Q I notice at the bottom it says Wayne Watkinson, legal [256] counsel. Who is Wayne Watkinson?

A Wayne Watkinson is a member of a law firm with which the board, under a memorandum of understanding with the USDA, engages to provide certain advice and counsel.

Q So he, Wayne Watkinson, is the CBB's attorney?

A Actually I think USDA is our attorney, if you will. Wayne does provide counsel on a number of issues.

Q And isn't it true that Wayne Watkinson is also the NCBA's attorney?

A I didn't realize that, if that's the case.

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[257]

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Q Okay. I'll represent to you that Exhibit A is a bundle of documents that the parties have stipulated are advertising and promotion paid for by the checkoff. Does that look to be the case?

A Yes, it does.

Q I'm going to turn to the first page where we have the bendable, stretchable, pulled in all directions modern mom. That's a beef checkoff ad?

A Yes, it is.

Q I want to you look at the copyright on the side and tell me what that says?

A At the very bottom of the ad where it says "Funded by America's beef producers?"

Q Not that, but on the side, horizontal, can you read that?

A Barely. I think it says, "2000 National Cattlemen's Beef Association and Cattlemen's Beef Board."

Q So this is a beef checkoff funded message, correct?

A Yes.

[258]

Q And it's copyrighted by the National Cattlemen's Beef Association? Right?

A The advertising agency has a contract with the National Cattlemen's Beef Association. We are funding the program because we are required by federal law to contract through existing industry organizations. NCBA is acting as an agent for the Beef Board in its relationship to the advertising agency who purchased the copyright in both names, or acquired the copyright in both names.

Q Can a private trade organization copyright what is allegedly government speech?

A I've never been to law school—

Q Okay.

A —and I don't know the answer to that question.

Q That's a good answer.

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[259]

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Q And there it is again, copyright, 1999, NCBA. Are all of the beef checkoff advertising all advertisements paid for with producers checkoff dollars copyrighted by the NCBA?

A No.

Q What's the percentage?

A Well, it would be the same percent as are contracted with NCBA. But, remember, we also have contracts with other organizations. They are required to copyright those things that need to be copyrighted with the ownership interests vested in the Beef Board and through the Beef Board/USDA.

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[260]

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MR. PARSON: About page 7 of 26 C.

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[Q] Is this a CBB document, first of all?

A Yes.

Q "And the people who decide how these dollars are used are producers who pay the checkoff and understand what's [261] best for our state and our business," is that true?

A Yes, I believe it is. Subject, again, to USDA approval.

Q Page 6 of the same exhibit, probably the page right before, "Our beef checkoff . . . producers helping producers." This is a CBB document?

A Yes.

Q "Producers run our beef checkoff. The beef checkoff is effective because the people making the decisions are producers just like us." Is that true?

A Yes. Again, subject to USDA approval.

Q Page 3 of that exhibit, "Your beef checkoff is producer-led." I think you've already testified that that's true?

A I believe I explained that earlier.

Q Then finally page 2 of 26C, "All checkoff-funded programs are budgeted and evaluated by the Beef Board, an independent organization of 111 grassroots volunteers." My question is this:

Is the Beef Board, as you state in this ad, an independent organization of 111 grassroots volunteers or is is it the United States Government?

A Those grassroots volunteers are appointed by the United States Government. You can't separate those two facts.

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[262]

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CROSS-EXAMINATION

BY MR. BREWERS:

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[266]

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Q I would again refer you to the demonstrative chart that Ms. McKee drew. One of the things that I don't think has been answered yet is the issue as to what happens with the voluntary payments from the Qualified State Beef Councils that are passed on to the Federation. Do those continue to be under the control of the Cattlemen's Beef Board and follow the legislation created by the Act and the Order?

A Yes, they do. They're subject to the same restrictions as the Act and Order.

Q One hundred percent of those voluntary contributions still must comply with the Act and Order?

A That is correct.

Q And who monitors the progress or the activities to make sure that that happens?

[267]

A The Cattlemen's Beef Board and USDA.

Q Can you tell the Court approximately out of the 50 cents per dollar that the State Qualified Beef Boards are entitled to retain, how much of that do they turn in to the Federation?

A It varies from year to year. In recent years I would say approximately 12 million of the 36 million.

Q So approximately a third?

A Correct.

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[268]

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Q But you have testified to Congress, isn't that right?

A On request, yes.

Q Upon request of whom?

A Of Congress.

Q Does that testimony have to be approved in advance by anyone?

A By USDA.

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[269]

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Q You also indicated something to the effect that it is your understanding, Cattlemen's Beef Board's understanding, that the Act does not allow disparaging comments about other commodities, is that right?

A That is correct.

Q So it is your understanding, for instance, that a project, a communication type project that is coming through the Cattlemen's Beef Board could not say beef is better than pork?

[270]

A We might believe that. USDA would not allow us to say that with checkoff funded programs.

Q Even if the contractor came in with an authorization request that they were firmly convinced beef is better than pork, they can't say that?

A They cannot say that. They can't even imply that. We have a very specific example where it was not pork, but chicken. Clearly the producers would have loved, USDA wouldn't let us do it.

Q Just tell the Court what that ad was.

A The best I remember, and I don't have it in front of me, the gist of it was something like this:

Ever notice how whenever someone tries to get you to eat something weird they'll tell you it tastes like chicken. Try possum, it tastes like chicken. Have some rattlesnake, it tastes like chicken. Have some armadillo, it tastes like chicken. Beef doesn't taste like chicken. Beef is what's for dinner. It would have been a terrific ad. USDA wouldn't let us do it.

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[272]

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Q I'd ask that you rely upon your own recollect of the testimony.

But when Johnnie Smith was testifying he indicated that he has personally seen examples of where USDA—or, where someone in the early stages of an authorization request has made the comment that this

proposal will never fly because USDA won't let it happen. Does that actually happen?

A Yes, it does.

Q At what stages of the process?

A Usually it's in the developmental stage. A State Beef Council may propose to do something that we become aware of either through reviewing the marketing plan or through another contact even earlier in the developmental stage, and we will provide our perspective on whether or not that's permissible under the Act and Order and the guidelines.

Quite frankly, in some cases State Beef Councils may contact USDA directly. They may not wish to hear our perspective and they want to go directly to the USDA. [273] Certainly does happen.

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REDIRECT EXAMINATION

BY MS. McKEE:

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[276]

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Q Mr. Reese, I represent to you that this is a copy of a federal regulation and I ask you to direct your attention to the bottom of the first column which is Section 1260.215, Patents, copyrights, inventions and publications. Do you see that, sir?

A I do.

Q Could you read the first sentence of Subsection A that starts at the bottom of the column and continues to the top of the second column?

[277]

A "Any patents, copyrights, inventions or publications developed through the use of funds collected by the Board under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other such uses of such patents, copyrights, inventions, or publications, ensure to the benefit of the Board."

Q Thank you, sir.

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[278]

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RECROSS-EXAMINATION

BY MR. PARSONS:

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[279]

[Q] Does USDA in that oversight process ever review projects which have been rejected by the Beef Operating Committee?

A They see all of the AR's. Occasionally they will respond. I recall an instance, for example, when the Foreign Agricultural Service suggested that when the Operating Committee had turned down a foreign marketing proposal in a certain region, they indicated

that they had planned to put money into that region and would withdraw those funds unless the Operating Committee reconsidered. The Operating Committee reconsidered at the next meeting and did approve that proposal.

Q Did the USDA revert to the CBB's decision to not adopt it?

A The Operating Committee reversed its own decision after being contacted by USDA.

Q Are you aware of the USDA ever overturning a CBB decision?

A Yes.

Q In that vein?

A In what vein.

Q A decision to reject a proposal.

A The only instance I can recall is the one I just described for you.

[280]

Q But that was the Operating Committee changing its own mind?

A It was the Operating Committee deciding not to fund a proposal, USDA sending a letter to the Beef Board questioning that decision, the Operating Committee then at its next meeting deciding to fund the proposal that it had previously rejected based on the input it had received from USDA.

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EXAMINATION

BY THE COURT:

Q Mr. Reese, I'm sure this is in some of the material, but I have forgotten this, I believe.

What percent of the receipts, the annual receipts, is spent on the average for advertising and public relations to try to sell beef?

A Your Honor—

Q Just a rough estimate.

A Okay. The advertising alone represents over 50 percent of the budget each year. I'd say the total would be on the order of 85 to 90 percent, and I'm excluding from that total the costs for administration, which are limited to five percent and never approach that figure, and the costs for [281] evaluation, USDA oversight, and research, which is not direct promotion of beef.

Q So the breakdown for research would be what, approximately?

A Ten, 12 percent in a given year.

Q And what about for the producer information?

A Normally—that has varied through the years from as high as four million to as low as five hundred thousand. I'd say typically it's about two percent.

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[Volume 3]

[Testimony of Barry Carpenter – Excerpts]

[287]

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BARRY CARPENTER, DEFENDANTS' WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. LEV:

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[289]

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Q Mr. Carpenter, we heard some testimony this morning regarding how members, how individuals end up as members of the Beef Board. Could you tell us, does USDA have any role in that process?

A The Secretary of Agriculture appoints members to the Beef Board.

Q And how does he or she pool people for the Secretary to select the numbers who are appointed to the Beef Board?

A Early in the calendar year the Department goes out with a request seeking organizations that would like to nominate individuals to be on the Beef Board. We receive those applications in. We review them for the criteria that's in the Act and the Order and we certified organizations that meet the criteria.

Q Now, these organizations that the Department certifies, are those the same as the Qualified State Beef Councils we've heard about today?

A No. They are organizations that represent cattle producers in the states that would like to have the opportunity to nominate individuals to be on the Board.

Q And how does that nomination process work?

A We certify these entities in the states. And it ranges anywhere from some states have none right now to, I think, [290] the most right now are 18 different organizations in the state. Depending on the number of vacancies in the state, each entity is entitled to nominate or has to nominate at least a minimum of two if they want to send a nomination in. We do encourage them to caucus with the other groups in the state and send us in a consensus slate. Sometimes that happens and sometimes it doesn't. But ultimately we get at the Department a list of individuals that are being nominated for the open seat on the Board.

Q And you said something about a minimum of two. Does it have a minimum of two names per open seat on the Board?

A That's correct. We expect a minimum of two names for each seat. We many times get more than that because the organizations don't necessarily agree on which two they want to send forward.

Q And then it's up to the Secretary to select from that list of names which individuals to appoint to that seat on the Board?

A We review the applications of each individual person that's been nominated and we do some background checks and then we forward that information along to the Secretary so the Secretary can make a decision.

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[292]

[Q] Mr. Carpenter, we heard testimony this morning from Mr. Reese describing the process by which projects and ads are approved under the Beef Act. And I'd like to ask you a few questions about your office's involvement in that process. As an initial matter, could you describe for us generally the nature of your involvement in that process?

A Well, first of all, it's definitely not a part-time activity. I have one full-time staff person assigned to that responsibility. I have others as necessary. And then myself and my associate are involved again as the situation evolves.

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[293]

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Q Now, Mr. Reese described a rather elaborate process by which proposals are made, approvals recommended, and finally given. And before we talk about that formal process I'd like to ask you, is your involvement in the development process limited to participation in the formal committee structure that Mr. Reese described this morning?

A Like I said two seconds ago, this is not a part-time activity. We're involved in the activities of the Beef Board every day. Our involvement on the—whether it be a [294] project, whatever activity they're taking on, is a daily involvement. Depending on the substance of it, it could begin as simple as me talking to producers about issues they want to pursue up to getting inquiries

from staff, or the board, or from Qualified Beef Councils.

Q So you have interactions with the Beef Board members and staff outside of the formal process you were talking about this morning?

A Absolutely. That's only a minimal part of my interactions with the Board staff to assure, and with, like, the chairman of the Board, and the Executive Committee. Those are my focal points.

Q You said that's just a minimal part of your interaction. Were you referring to the formal process or to the interaction outside of the formal committee process?

A The formal process is just a minimum part. A few days a year.

Q Mr. Carpenter, could you provide us any examples of the kind of issues that you've addressed in your oversight role outside of the formal committee process that we've been talking about?

A A couple of examples. As I said earlier, I get calls from producers, I get calls from Qualified State Beef Councils. Occasionally they call me with an issue they want to pursue. I find out [295] whether they can do it or not. In fact, if I tell them they can't do, they don't waste their time trying to pursue and develop it further.

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A Excuse me. Can I make a comment on that last question?

Q Absolutely.

A What I described was a—where the Qualified Beef Councils come to me to get something done.

I also have a situation where I do the reverse of that. When the Department has some initiative, which recently we've had initiatives to do outreach to limited resources to [296] minority farmers, and livestock producers, cattle producers. In that case I went to the Qualified State Beef Councils, told them here's the Department's own initiative, I need you to participate in this, and they did.

So there's communication both ways, whether I'm looking for something I need them to do or the reverse of that.

* * * * *

Q And do you and your staff attend these convention like gatherings where the Beef Board meets?

[297]

A I attend most of them personally, but I always have staff there.

Q And before you attend what kind of involvement is there in the planning and preparation for these meetings on USDA's end?

A Well, to the extent it involves projects, authorization requests, the agenda items, all of those are provided to us in advance of the meeting. My staff looks at them, we try to identified things that we may have concerns about. If we do see things we have concerns about, we go back to the staff, or the Board, or whoever is the appropriate target to go back and gets things changed and get those fixed before the meetings ever start.

Q And are those concerns generally fixed prior to the meetings if you raise them?

A If I raise them, they're always fixed.

Q And can you describe for us the nature of you and your staff's involvement at the meeting?

A In the meetings we are—again, we have the script, if you will. We know what the agenda is and we know what the issues to be discussed are. We actively listen to what's going on in there. As they move through certain issues we track those. If we see a problem where they're going, and they're approaching making a decision that ultimately I'm going to have to disapprove, then we step in and put them [298] back on course.

Q And is your participation at these meetings limited to speaking up at the meetings themselves?

A No. Actually most of the adjustments I have to make to the activities are done in a more individual setting with key members of the groups. I may pull the chairman of the Board aside and point out some issues I have concerns with, or maybe individual members that are trying to pursue a certain issue that I know can go nowhere, I get them aside and say, you know, that's a good idea, it's a good thing to do, except you can't do it with checkoff dollars. And then I don't have to take a major role and use part of their time in the debate process of where they're going with checkoff dollars.

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[299]

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Q And in terms of the subject matter, what kind of issues—is there any principle on what kind of issues it is you would raise with the Board?

A Well, clearly anything they are contemplating doing that's not consistent with the Act and Order is obviously something that is a nonstarter. And, then, if the department has some major initiatives that we are trying to pursue, that's my opportunity to take advantage of that resource to try to pursue them.

Q And can you provide the Court with some examples of the kind of issues that you've spoken up on or corrected the Beef Board to pursue?

A It obviously depends on what's going on in U.S. agriculture. But most recently areas dealing with food safety, animal diseases, like hoof and mouth disease, BSE, exports. Recently there was a problem with BSE in Japan that had a devastating impact on our exports there on beef. The Department was very concerned about that, we wanted to use every possible resource at our disposal to try to make an impact there. I conveyed that to the Board.

[300]

Those are the kinds of things. When an issue that the Department is trying to pursue.

Q And the kinds of things you mentioned on food safety issues, what you're saying is if you want funds spent on those issues you tell that to the Board?

A I tell the Board I expect them to endorse the Department's initiatives and to use their resources to address those.

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[302]

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Q And, in your experience, when the Department expresses displeasure at an Operating Committee decision not to fund something, the Operating Committee typically follows the Department's request?

A Certainly every time I've done that they've followed the direction I've given them.

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[304]

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Q And if you had a serious concern, if you had a real issue to which direction the board was taking, where would you raise that concern typically?

A One of two ways. I would either do it during the executive session of the Executive Committee, or I would bring the officers into my office and have a very frank discussion with them.

Q So you wouldn't raise those kind of issues at a full Beef Board meeting?

A That's really not my style. No different than what I do [305] with other employees of the Department, other individuals I manage. I prefer to do those type of things in what I consider an appropriate setting.

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[Q] Can you tell us what happens once a project has been approved by the Operating Committee and the Executive Committee?

A Once it has been through that part of the process, I get a letter from the Beef Board seeking my approval of whatever it is, project, contract, whatever the issue is. When I get it, my staff again goes through it to make sure it is, in fact, what we expect it to be. Remember, we've been involved in this from its inception. We review it, make sure it's what it's supposed to be. If I need to bring in the General Counsel's office to look at it, I do. If I need [306] to bring in my financial officer, I do. But ultimately I approve the document.

Q And do you generally, in fact, approve most of the projects and other things that are brought to your attention for approval?

A. As I stated earlier, I approve almost everything that gets here. In fact, if I didn't approve it, I would feel somewhere we failed along the way because it should not get to that far in the process without being what I'm going to approve.

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Q Mr. Carpenter, we talked about proposals. Does the process you just described apply to the Beef Board budget as well?

A Yes.

Q What about individual ads, once an authorization request has been approved by the Department and a contractor is [307] hired to carry out the project, do you have any role in overseeing the end product?

A We approve the ads.

Q You approve all the ads?

A We approve the substance and language of all the ads. Obviously if they get a statement, and a simple

one is, obviously, "Beef, it's what's for dinner." That statement may be on the radio, television, on a print ad, it may get put with different pictures. But the substance and the language we do approve.

MR. LEV: I'd like to ask the Clerk to show the witness Defendants' Exhibit 219, please.

BY MR. LEV:

Q Mr. Carpenter, do you recognize this document?

A Yes. It's a letter to the Beef Board from my office disapproving an advertisement.

Q And why was this advertisement disapproved?

A This ad was disapproved because it was disparging to another commodity.

Q And is the ad we're speaking about the one Mr. Reese testified to this morning regarding tastes like chicken?

A Yes, I believe it is.

Q You're using the Department's authority to deprive the American consumers of humorous ads?

A I didn't disapprove it because of the humor. I [308] disapproved it because it's disparging to the other commodity.

Q And are there other instances in which the Department has rejected a specific ad that has been submitted to you for your approval?

A Yes.

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Q Did you make the statement that's attributed to you in the second to the last paragraph of Plaintiffs' Exhibit 56?

A I made a lot of statements that day and this certainly was one of them.

Q And do you believe that statement is consistent with the testimony today regarding the nature of the oversight that USDA exercises over the Beef Board?

A Yes, I do. Two key points. One, I expect them to carry their functions out in a proper manner. And the other thing is that the industry will make decisions. [309] Remember, these Board members, they're on the Board because they're from the industry. They're cattle producers that were nominated by other cattle producers from the state and appointed by the Secretary. They're cattle producers, they're making cattle producer type decisions, but they're doing that under the direction and under the authority given to them by the statute and by the Secretary of Agriculture. So, yeah, I believe this is consistent with what I'm saying.

Q Mr. Carpenter, we've discussed your role in overseeing the development of specific checkoff funded projects and budgets and I would like to speak a little bit about your role in other aspects, your other involvement with the Beef Board. And I guess I'd like to start with the new Beef Board members.

What happens after the Secretary appoints—selects those members from the nominations and appoints them to the Beef Board?

A Well, one of the first orders of business is orientation.

Q And do you participate in that orientation?

A Yes, I'm an active participa[nt] in that orientation each year.

Q And what do you tell these new Beef Board members?

A Well, that's the first opportunity anyone in the [310] Department has to enlighten them to what their new job is. Outline their responsibilities. What they're required to do under the Act and the Order. I discuss things like how changes are made, the regulatory rule making process in order to make a change in the way they do business. I get into some of the fiduciary responsibilities. I give just a general overview of what their responsibilities are and I make it very clear to them that what they do ultimately has to come to me for my final approval or they can't spend the money.

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Q Mr. Carpenter, we heard testimony from Mr. Reese about how the Beef Board contracts out the actual implementation of projects once they have been approved by the Department. Does the Department have any role in reviewing or any [311] kind of oversight role regarding the contracts that the Beef Board enters into?

A Like all the other activities, the contracts have to be approved by the USDA. We look for things like are they contracting with an organization that is allowed by the Act and the Order. And we look at the substance of the contract. Again, to the extent that I need General Counsel to look at it, they do. If I need financial people to look at it, they do. And ultimately if I approve it they can enter into the contract.

MR. LEV: I'd like to ask the Clerk to please show Mr. Carpenter what's been marked Defendants' Exhibit 239, please.

BY MR. LEV:

Q Mr. Carpenter, do you recognize this document?

A Yes, I do.

Q And can you tell us what it is, please?

A It's a letter to me from Monte Reese of the Beef Board asking for authority to contract with the U.S. Meat Export Federation.

Q And why was Mr. Reese seeking your approval to contract with the Meat Export Federation?

A Because, I think as I just stated, they can't contract with anyone without my approval.

Q Was there a particular concern with the Meat Export [312] Federation at that time?

A Actually there has been. One of our required internal audits of that contractor raised a concern over their internal controls. And I told the Board they could not contract with them until those were resolved to my satisfaction. And that's what this letter is all about.

Q And, so, that applies with respect to any Beef Board contractor, they have to have in place mechanisms to make sure that the money they get for checkoff projects are only spent in executing checkoff projects?

A That's correct.

Q Mr. Carpenter, I'm about to turn to another area. Could you sum up for us what your view is about your

role in the process we've just been discussing regarding approval of projects?

A Well, I'll sum it up as best I can.

My role begins with when the idea surfaces, whether it surfaced from me or from a grassroots producer. And ends when a project contract authorization request is on my desk [313] and I ultimately approve it or disapprove it. If I approve it, they can spend the money. If I don't approve it, they can't spend the money.

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[314]

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Q And what kind of oversight is exercised over the Qualified State Beef Councils' expenditure of those funds?

A All these dollars are collected under federal statute and they all have the same restrictions. They're expected to spend those funds consistent with the Act and the Order.

Q And what steps are taken to ensure that they, in fact, do spend those funds consistent with the Act and the Order?

A Well, we've directed the Beef Board to provide oversight. They're required to provide a marketing plan each year. And also require them to have an audit each year, a financial audit.

In addition to that, we directed the Beef Board to do periodic reviews of their programs to make sure, in fact, they are carrying out the marketing plans as required.

Q And does USDA review any of those materials?

A We review all of the reviews that are done by the Beef Board and we review the financial audits on any that raise a concern. Which generally is not a major issue. But when there is a concern we review those. And ultimately before we sign off on any of those reviews they have to be resolved to our satisfaction.

[315]

Q And is the oversight role that the Beef Board exercises over the Qualified State Beef Council, are the marketing plans, and the audits, and the reviews just discussed, are those issues discussed by the Executive Committee of the Beef Board?

A Most all of those audits and reviews are discussed in executive sessions of the Executive Committee.

Q And do you or somebody from the Department attend all those executive sessions of the Executive Committee?

A Yes, we do.

Q Mr. Carpenter, you've described for us how you conduct orientation sessions for new members of the Beef Board and how you will be conducting orientation sessions for new members of the Operating Committee.

Do you conduct any orientation sessions for members of the Qualified State Beef Councils?

A I participate in the training sessions for Qualified State Beef Councils. Periodically the Board brings them together for training and I take that opportunity to make sure the Qualified State Beef Councils are aware of what the requirements are. And I was pleased yesterday to hear one of the prior witnesses make

reference to that. It means my training has been effective.

Q Mr. Carpenter, what about the ads that are produced by the Qualified State Beef Councils, what kind of oversight [316] does USDA exercise over the contents of those ads?

A If the state wants to enter into any brand advertising, those have to be approved in advance. The majority of the state advertising is an offshoot of the common theme that's been developed at the national level and actually we—I review and approve all those.

Q And let's say there's some ad that's out there that somehow doesn't match up with the national program and you saw it, what would you do?

A First of all, if it was an ad that was consistent with the Act and the Order, we wouldn't do anything. If we have some concerns about the ad we'd either probably, first of all, contact the Beef Board to activate their oversight. And depending on what it was, I may call them directly and take care of the issue. I can't think of a particular—I can't think of a case where that happened necessarily, but if it did, I would take whatever action is appropriate.

Q And if there was an ad that you thought violated the Act and the Order would you order the end of the publication if you thought inappropriate?

A Oh, absolutely. In fact, depending on the significance of it I may also require them to recou[p] the funds they've spent on the ad.

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[317]

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Q Mr. Carpenter, you mentioned the Federation and that reminded me of one other question that I wanted to ask you and that is, does the Department ever review any of the audits of NCBA that Mr. Reese testified to this morning?

A We review all the audits of the major contractors.

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Q Are you familiar with the Department of Agriculture's grading programs?

A I'm very familiar. That's where I started my career and I currently manage that program.

Q And can you describe for us what impact, if any, that program has on the market for beef in America?

A We grade about 95 percent of all the steers and heifers slaughtered in the United States. And those grades are the primary factor in determining the price that's paid for those livestock.

Q The program is voluntary, isn't it?

A From a regulatory standpoint it's voluntary. From a market standpoint I would argue if you want to come close to getting full market value for your livestock you better have them graded.

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CROSS-EXAMINATION

BY MR. HEIDEPRIEM:

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[327]

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Q Would you make checkoff dollars available for American producers who want to do that?

A Would I make checkoff dollars available for someone who would like to—

Q Identify their product as an American product.

A No. That would be inappropriate use of the checkoff dollars.

Q Why?

A A couple of reasons. First of all, the checkoff dollars are collected on all beef and cattle, including imports. And the focus is to market beef.

Q Well, why couldn't you allow importers the same opportunity to identify their product by their name? You wouldn't be denigrading any particular product then, would [328] you, if you believe they are generically equivalent?

A The statement I made earlier, I think, really explains this. In the U.S. marketplace—the marketplace does not differentiate at this time depending on where the cattle—where the product originates.

For example, when you go to Burger King and you eat a hamburger it doesn't differentiate that two-

thirds of that came from Australia and a third of it came from South Dakota.

Q It may not, Mr. Carpenter. But when you go to the grocery store and you look at a sirloin steak you don't know where that comes from, do you, today?

A You know, based on the label, that it has come through the U.S. inspection system. And if it's been graded, which it probably has, it's going to be labeled with the U.S. grade.

Q Not my question.

My question is, do you know where that sirloin steak came from?

A I personally don't have any idea where it came from.

Q Is it your testimony that to the consumers in country it is no different than buying a hamburger at Burger King, to shop for that sirloin?

A Would you ask me that again, please?

Q Do you believe there is no difference to the consumer in [329] this country whether they're buying a hamburger at Burger King or shopping for a sirloin steak in terms of the information available about where that meat came from?

A First of all, I don't necessarily profess to be an expert in consumer attitudes. But I believe what the marketplace has demonstrated, there's no demand for that.

Q Let me back up, then. Mr. Carpenter, do you believe, as a general rule, that American raised beef is a better product than foreign imported beef?

A The quality of the beef is not a function where it was born. Quality of the beef is a function of its [inherent] characteristics.

Q Is your answer to my question, no, that you do not believe American raised beef is better, as a general rule, than foreign imported beef?

A I don't believe you can make it—the comment in that regard. I don't think you can say all American beef as compared to all imported beef. Each animal is an individual, each one has gone through different management practices to get there, is going to have different characteristics when it hits the marketplace.

Q I'm not asking you if every cut of beef ever raised in American is better than every cut of beef raised in any [330] other country. I'm asking you if, as a general rule, you recognize an American beef as a superior product to that of imports from other countries, yes or no?

A If you pick a specific country. If you're comparing it—that's a question that doesn't have a yes or no answer.

Q Well, then, your answer would be, no, you don't recognize an American beef product as, generally speaking, superior?

A Some American products are superior to some imported products from some foreign countries, some may or may not be.

Q You find it impossible to generalize, then, by country? You truly believe that beef products, regardless of country, are generically equivalent, that's your belief?

A I don't believe I said that.

Q You don't believe that?

A I don't believe I said that.

Q What do you believe as to whether beef products from different countries are generically equivalent?

A I think each product stands on its own. If you want to go down a list of products, Croby beef in Japan is far superior to a certain beef steak made from Australia or from the United States. It's product specific, not nationality specific.

[331]

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[Q] Would you at least agree with me that American beef products are recognized, as against their foreign competitors, as superior in foreign markets?

A Beef that goes through the USDA grading service and is graded prime or choice is recognized as superior quality beef around the world, if that's what you're looking for.

Q What was the last thing you said?

A I said, if that's the question you're asking me.

Q So would your answer to my question be, yes, that in foreign markets American raised beef is recognized, as against its foreign competitors, as a superior product?

A I'll try to make it clear as I can. U.S. beef that's been graded prime and choice, going into a marketplace that prefers that type of beef, is recognized as superior.

Q And, as it happens, that's the only place where checkoff dollars are used to distinguish American beef from its foreign competitors, true?

A When it goes into the export marketplace part of that message is where, the country that beef came from. It does not distinguish where that beef was born, it distinguishes the country that product was shipped from.

Q Well, hasn't there been testimony in this trial that a [332] portion of checkoff dollars go to develop markets for American beef as distinct from other kinds in foreign countries?

A It's a market program to support and promote U.S. beef in those other countries. That U.S. beef is a product of the U.S. meat inspection system and labeled accordingly.

Q And that's the same beef that you've already told me is recognized as superior, generally speaking, as against its competitors in foreign markets?

A That qualify of beef in that market, yes.

Q So why can't we use checkoff dollars to do the same thing in the United States with the same U.S. beef products as against the same foreign competitors?

A All of the beef in the United States that gets marketed in that category meets those characteristics and is marketed accordingly. When they market prime and choice beef, that beef being marketed for its characteristics and its ability to meet the needs of the consumer.

Q Is it fair to say, then, when you hear the testimony of the plaintiffs in this case that they recognize a specific competitors that, in your opinion, they are wrong?

A I can't speak for what their opinion is. I can tell—

Q Well, you heard their opinion.

[333]

A I heard their opinion. I don't know how they formed their opinion.

Q Okay.

A They might like red ones better than black ones. But if you're trying to get down to the quality of the product—

Q There's no difference?

A —the grading system sorts that out. And once it's sorted out they're indistinguishable.

Q Okay. So if the grading system identifies them as in the same category, in your view they are indistinguishable, they are generically equivalent?

A From a product quality standpoint.

Q So you do think that the plaintiffs who testified that there is a distinct difference were simply wrong?

A Again, I don't know what they're basing it on. I don't think any of them specifically talked about the quality of the product and what U.S. grading cattle they're calling for.

Q Sir, I'm not asking you to judge their basis. I'm simply asking you to describe that the opinion you hold is that they are wrong?

A My opinion is that I don't know what they're basing it on. I'm saying if they were basing it on the quality of the product, and the product is indistinguishable, then I [334] disagree with them. They may have been basing it on something else.

Q Do you understand their desire to want to use beef checkoff dollars to promote American made products here at home?

A I heard that very well yesterday, yes.

Q Do you think that's just misplaced on their part?

A I don't—I don't see where there's an opportunity to enhance the marketplace by subdividing a product after being marketed. The objective is to increase the demand for beef.

Q I just have one more question about this grading and quality issue and I'll leave it alone, Mr. Carpenter. But you testified that in those foreign markets where our products, American products, are recognized as superior as distinct from their foreign products, that is true as to products that are graded in the same category, correct?

A Correct.

Q Will you please get it through my head why that's not true here in America? Why it's not true that American products are regarded as superior generally as against foreign competitors which have been graded in the same category?

A The product we export to Japan, for example, virtually the same product that's in our marketplace here. We don't need to tell the people in Japan—or, in the [335] United States that this product is a function of our meat inspection system and our process.

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Q Would you agree with me that this reflects beef and veal imports into the United States in metric tons

in 1996 was 940,000 metric tons? Would you agree with that?

[336]

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Q Okay. 940,000 metric tons of beef and veal imported in the United States that year, correct?

A Yes.

Q That figure rose to 1,063 in 1997, correct?

A That's correct.

Q Continued to increase until 2001 of 1,397, which would be 1,397,000 metric tons, correct?

A Well, the last number is forecasted. But, yes, that's correct.

Q So in the last five years—or, according to this chart, from 1996 when it was 940, it grew to 1397, or approximately 1400 projected for 2001, right?

A That's correct.

Q So you would agree with me that imports have grown over the last five years by the margin indicated in this chart?

A I have no reason to believe this chart is not accurate, that's correct.

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[337]

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Q Imports, 1.2 billion up to 2.4 billion generally. Would that be accurate, as far as you know?

A I don't know—I don't know, I don't control this organization that put this together, but I have no reason to question that number.

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[Q] Mr. Carpenter, I think we can agree generally that imports are increasing and have increased steadily over the [338] years, correct?

A I think you can.

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[340]

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Q In other words, the consumption per capita in the United States of beef has declined those years since the inception of the beef checkoff?

A Correct.

Q And importation of beef products into the United States that shrinking consumption per capita has increased?

A Based on the previous chart I looked at, yes.

Q If you were an American producer of cattle wouldn't that concern you?

A I'm not an American producer of cattle. But I think I would look at it a little broader than that.

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[341]

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Q You don't remember that they expressed a specific concern to you about conflict of interest

between the policy element of NCA and the promotion side, which was the National Livestock and Meat Board?

A I don't remember the specific concern. But certainly control of checkoff dollars and how they get spent was a personal concern of mine.

Q But the merger went ahead anyway, didn't it?

A The combination of the Federation and NCA continued and became NCBA, yes.

Q Right. NCBA was created out of this merger in '95 or '96, right?

A I believe those dates are correct.

Q And wouldn't you agree with me that the purpose, or one of the purposes certainly, according to you, of that merger was so that the industry could speak with one voice?

A It had to do with—first of all, you had organizations which were the contractors to USDA—to USDA and the Beef Board. The National Livestock and Meat Board [342] and National Cattlemen's Association, two independent groups, deciding to take some action.

Q Okay. Mr. Carpenter, my question was, at least according to you, wasn't one of the purposes of the merger was so that the industry, the cattle industry could speak with one voice?

A Efficiency, targeting. I would have to see their list from the plan, but that sounds like some of the issues that were certainly being discussed and being counted as valuable ideas.

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[350]

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Q Do you remember telling me the Operating Committee makes decisions on projects that will be funded by the CBB? Do you remember telling me that?

A And I'm not changing that.

Q I thought—

A They make decisions. There's a lot of decisions in the process. I just make the final decision.

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[355]

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Q In any event, 10 of the 20 people are members or come through the NCBA, correct?

A They come through the Federation part of NCBA.

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[356]

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Q Their positive support is required before any money can be spent out of the checkoff?

A Before a decision is made by that entity and forwarded to the next level and ultimately gets to me it has to get out of that shop. If it doesn't survive there it doesn't make it.

Q And 10 votes doesn't get it out of the shop, does it?

A It's a two-thirds vote.

Q It's a two-thirds vote to survive. You need 14 votes out of the 20 to spend any money, right?

A I guess that's two-thirds, yes.

Q You don't have any power to spend that money, do you?

A Any power to spend it? No.

Q The Secretary doesn't have the power to spend the money—

A No.

Q —does she?

A No.

Q But the Beef Operating Committee, under the statute, has [357] the power to spend that money, correct?

A No. They have the power to identify areas where they would like to spend it.

Q Let me put it a different way. No money can be spent without the positive support of at least 14 members of the Beef Operating Committee?

A That's right. The process can't begin.

* * * * *

Q I want you to read aloud the first sentence of the third paragraph of Plaintiffs' 56, if you would, please?

A First sentence, third paragraph. "We don't second guess the industry's efforts to built a demand for beef."

Q You don't second guess the industry's efforts?

[358]

A To build demand for beef.

* * * * *

Q When you're talking to an industry group in Kansas City, Missouri, you find it desirable to indicate that the industry has control of this process, correct?

A The industry, as appointed by the Secretary, is the primary source of direction and ideas and that's why the Secretary put them on there, he wanted producers. Otherwise he'd of that hired 20 federal employees like me to make the decision.

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[359]

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[Q] The process of making decisions involving the beef checkoff dollars can be characterized as an industry process, or here in this courtroom as a government process, depending on which situation you find desirable?

A I describe it the same any time I talk about it. I doubt you'd ever find a meeting that I ever discussed this issue in that I didn't make it very clear that I had the final approval.

Q Mr. Carpenter, when you say to me we don't second guess the industry's efforts to build demand for beef, you're telling me that's entirely consistent with the testimony you've given us here today under oath about you having final authority over spending that money?

A I do.

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[360]

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THE COURT: Sir, I think I misunderstood your testimony.

I thought you said you had to approve John Smith's name as sent forward by the Federation. And if you hadn't [361] approved that, that John Smith was not a member of the Operating Committee.

A I get them in a package, all of them together. I don't get—

THE COURT: Let me ask my question again.

A I'm sorry.

THE COURT: When the Court asks a question, you want to try to answer it.

A I was trying.

THE COURT: All right. I understood your testimony to be that if John Smith's name came forward from the Federation you have to approve John Smith or he's not a member of the Operating Committee.

A That's correct. But it doesn't come with one name on the list.

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[363]

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Q You take a look at the credentials of the individual to decide whether you think they're qualified to serve on the Beef Operating Committee. Like you were

hiring someone for a job, you look at everything about the person?

A I look at everything that's germane to that statute. Not everything about them. They've got to be a member or an ex officio member of a Qualified State—of the board of directors of a Qualified State Beef Council. Obviously I look to see if that's the case.

Q Okay. Any other requirements than the one you just [364] identified, that the individual is from a Qualified State Beef Council? Is there any other conditions?

A That it came from an election process that we certify.

Q Okay, go ahead, I'm sorry.

A Not specific to the individual.

Q You don't look at any of the individual's credentials specifically, do you?

A What I just identified—

Q If they come from a—

A —their status as a member of the board of directors of a Qualified State Beef Council.

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CROSS-EXAMINATION

BY MR. BREWERS:

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[367]

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Q If you are attempting to determine whether or not a particular promotional activity or campaign meets

the requirements for approval, what are you relying on?

A I'm relying on all of the information that's been compiled as that project is being developed. The experts that were brought in to testify or give presentations about it. The facts they may use to determine whether there needs [368] to be marketing. The whole wealth of information that's generated as that project is developed. I've been privy to that all along as it's presented and developed and then considered.

Q And your agency, then, takes that information, those factual determinations that you can make, and tries to apply those to what you believe, your agency believes is what Congress told you to do?

A That's correct.

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[370]

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Q For the expenditure of checkoff dollars, does the CBB have any authority to contract for promotional activities without USDA approval?

A Absolutely not.

Q Is that specifically stated in every contract?

A I'd have to read the contract to see exactly what's stated in there. But something to that effect is in there, yes.

Q Has the USDA ever taken the position that beef checkoff dollars should be open to anyone who wants to promote messages about the cattle industry?

A No.

Q And although you do not say that a particular person or entity cannot hold certain beliefs, you limit the use of the money generated from the checkoff to programs or campaigns that promote what you interpret to be the congressional intent, is that right?

[371]

A That's correct. We limit the use of funds to those things that are consistent with the Act and the Order.

Q Is the checkoff and this whole process that we've been talking about, is that intended to be a place for individuals to come and air their personal ideologies?

A No, it's not. That's not the purpose of this whole program.

Q Or is it the purpose of the program to allow individuals to say that they prefer choice beef over prime beef?

A No. The purpose of the program—you know, I think it was stated much better than I can probably state it—but it is to increase the demand for beef in general. As well as the overall well-being of the cattle producers.

Q Is the checkoff, at least as USDA has operated it, is the checkoff a place to air the—or, share opposing messages?

A No.

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[373]

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Q Are you aware of any enforcement operations that are conducted by USDA in order to force a producer to comply with payments of the assessments?

A Yes. Periodically we have producers who fail to pay their checkoff. We try to convince them to pay with letters that I send them. When that fails, we take appropriate legal action to collect the funds.

Q Are you aware of NCBA or the Cattlemen's Beef Board ever taking actions to specifically enforce payment of the assessments?

A They don't do any enforcement. They begin the process by identifying and communicating with producers who have failed to pay, encouraging them to pay. But when it comes to the specific enforcement they contact me and I initiate the Department's activities to collect whatever funds or penalties are appropriate.

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[374]

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REDIRECT EXAMINATION

BY MR. LEV:

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[376]

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Q Mr. Carpenter, I think there was some confusion regarding the audit status of the Cattlemen's Beef Board and I just want to make sure the record is clear. Is the Beef Board, in fact, audited?

A Yes.

Q And it's audited by an independent accounting firm?

[377]

A That's correct.

Q And those audits are reviewed by USDA?

A Yes, they are.

Q Every single one?

A Every one of them.

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[384]

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Q I just have a few more questions, Mr. Carpenter.

Mr. Heidepriem asked you about whether something that the Operating Committee decides not to fund could ever be funded with checkoff funds and I believe you answered that would not be possible, correct?

A Correct.

Q But it was also your testimony earlier today that on occasion when there is a project that the Department is [385] interested in seeing funded you, or someone from the Department, will make that know to the Operating Committee, is that right?

A That's correct. I think I mentioned earlier today that those initiatives that the Department of Agriculture is trying to pursue, I'm expected to use every resource available to me to get those carried out. If there's an issue that I think is appropriate use the

checkoff dollars, I bring that to the attention of key participants in the Operating Committee, the Board, the Executive Committee and identify the Department's desire to pursue it.

Q And ultimately the Operating Committee still has to approve such project before it comes to you for final approval, correct?

A That's correct?

Q If you mentioned that you are interested in a particular area, is that approval generally forthcoming from the Operating Committee?

A The issues that I identify, first of all, are not petty issues. They're major issues important to the industry. And the best I can recall, the issues that I've raised have projects come forward for funding.

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[386]

RECROSS-EXAMINATION

BY MR. HEIDEPRIEM:

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[387]

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[Q] I want to talk to you about these 10 members of the Beef Operating Committee that are not appointed by the Secretary, all right?

A Yes.

Q You know the 10 I'm talking about, don't you?

A I do.

Q You do not nominate them?

A I do not not nominate them.

Q You do not vote for them?

A No, I don't vote for them.

Q You do not pick them?

A I don't—no, I don't pick them.

Q What you do involving those 10 is you certify a process. You say, yup, John Smith came from a Qualified State Council and this is an election that was appropriate under the circumstances and, therefore, all 10 are now on the Operating Committee, right?

A I certify the process as you indicated. I determine the eligibility. And if it meets those criteria, then I approve them to be on the Operating Committee.

Q You don't exercise discretion about a preference for a person based on that person's qualifications to be a good Board member, do you?

A The two criteria I just mentioned.

[388]

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Q Mr. Carpenter, when you speak of approving a contract forwarded by the Operating Committee or approving a person elected by the Federation as an Operating Committee member, do you do anything more than a ministerial review of compliance?

A Oh, absolutely. I think I indicated earlier, it's a full-time operation. I've got staff and myself involved from the inception of the ideas helping to, as I said, my style, provide them direction, and my solicitation, and

guidance, and steer them through their process. So, yes, I'm certainly more involved than you imply.

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EXAMINATION

BY THE COURT:

Q I think I heard you to say in response to a question from Mr. Lev that the fact that consumption of beef was declining doesn't tell us much since everything gets consumed. Is that basically what your testimony was?

[389]

A Yes. Yes, sir, I tried to make that clear.

Q Well, obviously if people aren't buying Buick automobiles then General Motors will stop producing them, won't they?

A That's correct.

Q And, likewise, if the consumption of beef is going down the cattle producers are ultimately going to stop producing them, aren't they, as they fall by the wayside?

A I don't—I'm not an economist. But my opinion would be that in the short term that wouldn't be the impact. But certainly in the long term it would be, yes, sir.

Q Of course, if people stop eating beef altogether there wouldn't be any cattle producers left, would there?

A That's correct.

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[393]

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Q Would you agree or disagree that if the beef checkoff were changed to promote the American people consuming American beef that that might well advance the arguments or the cause of those would favor country-of-origin labeling?

A It very well may. But I'm not sure.

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[394]

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Q What if these people who are claiming that the beef checkoff program should be used to promote the purchase and consumption of American beef just as a selfish interest, in other words, it wasn't based on any rationale, such as, in fact, American beef is better than beef from Canada, or Mexico, or Australia, or whatever, isn't that a belief that someone can hold?

A They can hold that belief. But the way we try to administer these programs is that we don't focus on individual beliefs, we try to focus on something that speaks for everybody.

Q But, in fact, that's probably the reason that the [395] textile industry tried to get "Made in the U.S.A." on their shirts, isn't it, or their trousers or whatever?

A I imagine, yes, sir.

Q Even though there's probably no difference between a white shirt manufactured in Canada or the one manufactured here.

A I think they probably assume that they give more value to that product by doing that.

Q Sure. Because the American consumer might try to act unfairly toward foreign producers.

A That's very possible, yes, sir. Seems to be purely a market driven persuasion. I've had discussions on this for a number of years and it seems always to get back to what is the marketplace willing to pay for.

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[398]

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THE COURT: Please be seated.

I have one other question of Mr. Carpenter before we proceed here, and he is still under oath. Mr. Carpenter, I notice—and you can stay right there, that's fine. Just have a seat there, that's fine.

I notice in this Cattlemen's Beef Board revenues and so forth the interest income for fiscal year 2001 was $980,000. And the projected interest income is $985,000 for fiscal year 2002.

Where are those funds invested to earn that kind of interest?

BARRY CARPENTER: That's a good point, Your Honor.

We require the Board to invest consistent with our policies. The specific places they're invested at, I'd have to go back and research that with our chief financial officer. But our—the Board's chief financial officer meets with our chief financial officer and we lay out the rules on where they can invest. They can't invest in a manner where there's a risk of losing the

money, that's basically the requirement. But the specific locations of the investments—I hope none was with Enron—but I don't [399] now where they are, Your Honor.

THE COURT: Are they, however, required to invest that money as a governmental agency would?

BARRY CARPENTER: Basically, yes, sir.

THE COURT: In U.S. Treasury bonds or notes?

BARRY CARPENTER: They have to invest—

THE COURT: Don't tell me if you don't know.

BARRY CARPENTER: I'll tell you what I know—

THE COURT: All right.

BARRY CARPENTER: —maybe that's not enough to answer your question.

But they have to invest it in the manner we prescribe to them and that's a manner where we don't believe there's any risk in loss.

THE COURT: Well, that could be, perhaps, in a sufficient number of CD's, couldn't it?

BARRY CARPENTER: It could be, yes, sir.

And beyond that, I don't know, you know, the specifics of it. They meet on occasion with our finance officer and look at your investment policy to make sure they're meeting our rules.

THE COURT: If they're earning $980,000, that looks to me like it's close to $50 million in reserves that the Board has. Assuming a two percent return.

BARRY CARPENTER: I think a lot of that is short [400] term investment as the money is coming in

and just a flow of funds as opposed to one set investment. But, again, I'm not certain of that.

THE COURT: Well, even a money market account doesn't earn any more than three percent today, that's for sure. That would be a very good money market account. Most of them are under two. Isn't that right?

BARRY CARPENTER: To the best of my knowledge, yes, sir.

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[401]

[MONTE REESE:]

The Board maintains a $5 million reserve balance and then there may be as much at 20 million that's collected but not yet paid out at any one time. I hope that answers your question.

THE COURT: So the total reserves are how much right now as we sit here today?

MONTE REESE: The reserves are 5 million.

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31 (181D)